SECURITY, POLITICS AND LAW IN AUSTRALIA'S "WAR ON TERROR"

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I certify that this thesis is entirely my own work

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ABSTRACT

This thesis examines the nature and scope of the contemporary threat of terrorism to Australia with a view to establishing whether the Australian government's domestic response has been proportional. It provides a comprehensive analysis of Australia's domestic response to the threat of terrorism and examines the interrelationship between security, politics and law (domestic anti-terrorism legislation in particular) in the Australian context. It sets out a theoretical framework for the analysis of Australia's counter-terrorism law and policy and argues that any such analysis ought to be based on the principle of proportionality.

The thesis is based on the finding that the policy and academic discourse on the subject has treated the terrorism threat to Australia as a given. There is a lack of analysis on whether Australia is (or was) subject to a terrorism threat in the first place, and if so, what the nature and scope of the threat is (or was). A key argument of the thesis is that the proportionality principle requires that any analysis of counter-terrorism policy and law begin with a realistic threat assessment. This is what appears to be missing in Australia to this day. Legal scholars refrain from examining the existence of a terrorism threat by noting that it is not a lawyer's task to second-guess the intentions of the executive and legislature. Scholars of political science, on the other hand, tend to neglect Australia's legal counter-terrorism framework as developed in the wake of the 11 September 2001 attacks.

The thesis has four interrelated key objectives. The first objective is to demonstrate that the Australian government, led by Prime Minister John Howard until late 2007, misportrayed and misunderstood the threat of terrorism to Australia. It is argued that the government's assessment and portrayal of the threat was fundamentally flawed and subject to a range of considerable misunderstandings and exaggerations. As a consequence, the second objective is to provide a re-assessment of the nature and scope of the terrorism threat to Australia. The third objective is to demonstrate that the Howard government's counter-terrorism law and policy was largely disproportionate to the threat faced by Australia. To this end, the domestic response – which has largely been legislative – is submitted to a proportionality analysis in the context of security, politics and the law. Lastly, the fourth objective is to examine the impact and effectiveness of Australia's counter-terrorism law and policy.

1

INTRODUCTION

On Inaugural Day 1933, at the height of the Great Depression, U.S. President Franklin D. Roosevelt galvanised the dispirited American people with a simple declaration of faith: "This great Nation will endure as it has endured, will revive and prosper. So, first of all, let me assert my firm belief that the only thing we have to fear is fear itself - nameless, unreasoning, unjustified terror which paralyses needed efforts to convert retreat into advance."[1] Roosevelt's reading of the situation at this critical juncture of history could hardly be more pertinent to the state of affairs today. International terrorism creates fear, individually and collectively. Indeed, it seems that terrorists gain power only if they inspire fear and panic in the minds of their audience. The attacks in the United States on 11 September 2001 ("9/11"), Bali, Madrid, London and elsewhere understandably inspired fear in the minds of people worldwide, and so the desire to escape from an atmosphere of fear into a climate of greater security is a natural reaction. Besides, as terrorism often violates the most basic aspects of human security, there is a duty for the state to respond. But the relentless pursuit of absolute "security" also brings great danger as an ill-conceived and fear-driven response may well damage the integrity and value of the state and may have severe consequences for the very way of life one is actually trying to defend. It is also obvious that a climate of fear can be fertile political ground for any incumbent government.

While the 9/11 attacks against shook much of the world to its core, the day's catastrophic events were a world away for many Australians, who felt confident that geographical fortuity insulated them from international turmoil. This perception, however, changed ultimately thirteen months later when terrorists bombed two night clubs in Kuta, Bali. Among the 202 people killed on 12 October 2002 were 88 Australian tourists. The Bali bombings were commonly seen as evidence that international terrorism had arrived on Australia's doorstep.[2] In fact, this proposition was actively advanced by the Australian government which repeatedly referred to the Bali bombings as evidence that the threat of terrorism had reached Australia.[3]

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[1] Quoted in Joseph M. Siracusa and David G. Coleman, *Depression to Cold War: A History of America from Herbert Hoover to Ronald Reagan* (Westport, CT: Praeger, 2002) 21-2.

[2] See, e.g., Carl Ungerer, "Australia's Policy Responses to Terrorism in Southeast Asia," *Global Change, Peace & Security* 18, no. 3 (2006): 193-99.

[3] See, e.g., Australian Government, Department of Foreign Affairs & Trade, *Transnational Terrorism: The Threat to Australia*, 2004, foreword, vii, 13; [hereinafter "2004 White Paper"].

In response to the 9/11 and Bali attacks, the Australian government took far-reaching action, both at home and abroad. At the international level, the government, led by Prime Minister John Howard, was a staunch supporter of the Bush administration and its "global war on terrorism". In 2001, Australia's Special Air Services Regiment assisted in the initial defeat of the Taliban in Afghanistan. In 2003, Australia was one of the few countries contributing ground troops to the invasion of Iraq. Canberra has also been actively promoting counter-terrorism efforts at the regional level. The Government has urged ASEAN's Regional Forum to focus on increasing counter-terrorism cooperation in the region. In addition, Australia has signed several counter-terrorism agreements with key South-East Asian nations including Indonesia, Malaysia, Thailand and the Philippines.[4] These agreements provide the basis for closer intelligence exchanges and strengthened cooperation between law enforcement agencies.

At the domestic level, counter-terrorism and emergency response capabilities have been reviewed and upgraded.[5] The Government introduced tighter financial, aviation and border control measures.[6] Other initiatives included the development of a nationwide response mechanism to manage possible terrorism attacks inside Australia.[7] An important feature of this national response mechanism is an inter-governmental agreement on counter-terrorism cooperation that is working on, among other things, the coordination of the protection of critical infrastructure and communications. The main focus of Australia's domestic campaign, however, has been on introducing and strengthening federal anti-terrorism laws.

The Importance of this Thesis

The aim of this thesis is to provide an interdisciplinary analysis of Australia's domestic counter-terrorism law and policy and to examine the interrelationship between security, politics and law (domestic anti-terrorism legislation in particular) in the Australian context. The thesis fills an important gap in the literature as there is currently no study providing an interdisciplinary analysis of Australia's response to the threat of international terrorism. In particular, there is no analysis examining Australia's counter-terrorism law and policy in the context of proportionality and with specific reference to the nature and scope of the threat.

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[4] See, e.g., Australian Government, Department of Foreign Affairs & Trade, "Fact Sheet: ASEAN, <http://www.dfat.gov.au/facts/asean.html>; see also Australian Government, Department of Foreign Affairs & Trade, *White Paper on Foreign Affairs and Trade: Advancing the National Interest*, 2003, Chapter 3.

[5] See, e.g., Parliament of Australia, Joint Standing Committee on Foreign Affairs, Defence and Trade, *Watching Brief on the War on Terrorism*, Report no. 120, 9 August 2004, <http://www.aph.gov.au/house/committee/jfadt/terrorism/report04.htm>.

[6] Ibid.

[7] Ibid.

The literature on the Australian response to the threat of terrorism can be generally divided into two categories:

- studies in the field of law which examine specific legal aspects of Australia's anti-terrorism legislation enacted in the aftermath of 9/11;

- studies in the field of political science which address a variety of implications of 9/11 and the threat of terrorism for Australian policy, both domestic and international.

In the field of law, some studies examine Australia's anti-terrorism legislation in the context of criminal law,[8] while others analyse the constitutional validity of the legal counter-terrorism framework.[9] Again other studies focus on the compatibility of the anti-terrorism laws with Australia's obligations under international law.[10]

As far as legal analyses of Australia's response to terrorism are concerned, the works of George Williams,[11] Andrew Lynch[12] and Greg Carne[13] have been particularly influential. Williams and

[8] See, inter alia, Jude McCulloch, "Australia's Anti-terrorism Legislation and the Jack Thomas Case," *Current Issues in Criminal Justice* 18, no. 2 (2006): 357-65; Patrick Emerton, "Paving the Way for Conviction without Evidence – A Disturbing Trend in Australia's 'Anti-Terrorism" Laws'," *QUT Law & Justice Journal* 4, no. 2 (2004): 129-66; Jude McCulloch, "Precrime and Counter-Terrorism: Imagining Future Crime in the 'War on Terror'," *British Journal of Criminology* 49, no. 5 (2009): 628-45; Jude McCulloch and Joo-Cheong Tham, "Secret State, Transparent Subject: The Australian Security Intelligence Organisation in the Age of Terror," *Australian and New Zealand Journal of Criminology* 38, no. 3 (2005): 400-15.

[9] See, inter alia, Andrew Lynch and Alex Reilly, "The Constitutional Validity of Terrorism Orders of Control and Preventative Detention," *Flinders Journal of Law Reform* 10, no. 1 (2007): 105-142; James Renwick, "The Constitutional Validity of Prevention Detention," in Andrew Lynch, Edwina MacDonald and George Williams (eds.), *Law and Liberty in the War on Terror* (Sydney: Federation Press, 2007) 127-135; Joo-Cheong Tham, "Possible Constitutional Objections to the Powers to Ban 'Terrorist' Organisations," *University of New South Wales Law Journal* 27, no. 2 (2004): 482-523.

[10] See, inter alia, Christopher Michaelsen, "International Human Rights on Trial: The United Kingdom's and Australia's Legal Response to 9/11," *Sydney Law Review* 25, no. 3 (2003): 275-303; Sarah Joseph, "Australian Counter-Terrorism Legislation and the International Human Rights Framework," *University of New South Wales Law Journal* 27, no. 2 (2004) 428-53.

[11] George Williams, "Australian Values and the War against Terrorism," *University of New South Wales Law Journal* 26, no. 1 (2003): 191-99; George Williams, *The Case for an Australian Bill of Rights: Freedom in the War on Terror* (Sydney, University of New South Wales Press, 2004). Ben Golder and George Williams, "What is 'Terrorism'? Problems of Legal Definition," *University of New South Wales Law Journal* 27, no. 2 (2004): 270-95; Ben Golder and George Williams, "Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism," *Journal of Comparative Policy Analysis* 8, no. 1, (2006): 43-62; George Williams, "One Year On: Australia's Legal Response to September 11," *Alternative Law Journal* 27, no. 5 (2002): 212-16; George Williams, "Why the ASIO Bill is Rotten to the Core," *The Age* (Melbourne), 27 August 2002.

[12] Andrew Lynch, "Legislating with Urgency – The Enactment of the *Anti-Terrorism Act [No. 1] 2005*," *Melbourne University Law Review* 30, no. 3 (2006): 747-781; Andrew Lynch and Alex Reilly, "The Constitutional Validity of Terrorism Orders of Control and Preventative Detention," *Flinders Journal of Law Reform* 10, no. 1 (2007): 105-142; Andrew Lynch, "Control Orders in Australia: a Further Case Study in the Migration of British Counter-Terrorism Law," *Oxford University Commonwealth Law Journal* 8, no. 2 (2008): 159-85.

[13] Greg Carne, "Gathered Intelligence or Antipodean Exceptionalism? Securing the Development of ASIO's Detention and Questioning Regime," *Adelaide Law Review* 27, no.1 (2006): 1-58; see also Greg Carne, "Prevent, Detain, Control and Order?: Legislative Process and Executive Outcomes in Enacting the Anti-Terrorism Act (No 2) 2005 (Cth)," *Flinders Journal of Law Reform* 10, no. 2 (2007): 17-79; Greg Carne, "Terror and the Ambit Claim: Security Legislation

Lynch, for instance, have co-authored and co-edited two important monographs. In *What Price Security – Taking Stock of Australia's Anti-Terror Laws*, published in 2006, they summarise and introduce to the lay reader the key components of Australia's anti-terrorism legislation.[14] Despite its title, however, this book does not concern itself with "security" and provides little policy and political context. The second book, *Law and Liberty in the War on Terror*, is an edited collection of conference papers of a three-day law symposium organised by Lynch, Williams and Edwina MacDonald and held at the University of New South Wales in Sydney in July 2007.[15] The chapters of this volume are mostly written by legal academics and focus on *specific* legal aspects of Australian anti-terrorism legislation. However, the collection does not contain any chapter focussing on terrorism as a "security" threat, nor does it examine the politics and political context of the Australian government's response in the aftermath of 9/11. Instead, it focuses on some of the technical issues of the operation of the new legislation and provides a rather legalistic analysis of key anti-terrorism provisions.[16]

Both books exemplify a trend among legal scholars to refrain from examining the political implications of Australia's anti-terrorism legislation as well as to refrain from subjecting the terrorism threat to closer analysis. [17] There is a simple explanation to these shortcomings: legal scholars take the view that it is not a lawyer's task to second-guess the intentions of the executive and legislature.[18] This trend in legal scholarship is mirrored by a similar tendency among scholars of political science and international relations to refrain from considering Australia's legal counter-terrorism framework. An exception to this trend is Jenny Hocking's *Terror Laws – ASIO, Counter-Terrorism and the Threat to Democracy* published in 2004. Hocking considers some anti-terrorism laws introduced by the Australian government in 2002 and 2003. However, the bulk of her book examines the expansion of Australia's internal security post-1945 with particular attention to the

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Amendment (Terrorism) Act 2002," *Public Law Review* 14, no. 1 (2003): 13-19; Greg Carne, "'Brigitte And The French Connection: Security *Carte Blanche* Or *A La Carte*"?' *Deakin Law Review* 9, no. 2 (2004): 573-620.

[14] Andrew Lynch and George Williams, *What Price Security – Taking Stock of Australia's Anti-Terror Laws* (Sydney: University of New South Wales Press, 2006).

[15] Andrew Lynch, Edwina Macdonald, George Williams (eds.), *Law and Liberty in the War on Terror* (Sydney: Federation Press, 2007).

[16] Christopher Michaelsen, "Book Review: Andrew Lynch, Edwina Macdonald, George Williams (eds.), 'Law and Liberty in the War on Terror' (Sydney: Federation Press, 2007)," *University of New South Wales Law Journal* 31, no. 1 (2008): 381-85.

[17] See, inter alia, Joo-Cheong Tham, "Casualties of the Domestic 'War on Terror': A Review of Recent Counter-Terrorism Laws," *Melbourne University Law Review* 28, no. 2 (2004): 512-32; Michael Head, "Counter-Terrorism' Laws: A Threat To Political Freedom, Civil Liberties and Constitutional Rights," *Melbourne University Law Review* 26, no. 3 (2002): 666–89; Michael Head, "Another Threat to Democratic Rights ASIO Detentions Cloaked in Secrecy," *Alternative Law Journal* 29, no. 2 (2003): 127-33; Nicole Rogers and Aidan Ricketts, "Fear of Freedom: Anti-Terrorism Laws and the Challenge to Australian Democracy," *Singapore Journal of Legal Studies* (2002): 149-75. For an edited collection that contains chapters on Australia's legal response in the post 9/11 era, see, e.g., Pene Mathew and Miriam Gani (eds.), *Fresh Perspectives on the "War on Terror* (Canberra: Australian National University E-Press, 2008).

[18] Andrew Lynch, "Control Orders in Australia: a Further Case Study in the Migration of British Counter-Terrorism Law," *Oxford University Commonwealth Law Journal* 8, no. 2 (2008): 159.

development of the Australian Security Intelligence Organisation.[19] As a consequence, the book's title is somewhat misleading as Hocking only devotes forty pages of her analysis to Australia's anti-terrorism legislation. The book also lacks an examination of the nature and scope the threat of terrorism faced by Australia and only includes developments up until 2003.

The political science and international relations literature on Australia's response to 9/11 focuses on specific (non-legal) domestic implications as well as regional and international challenges. As far as domestic issues are concerned, some scholars examine the significance of 9/11 for Australian immigration policy,[20] while others discuss the implications of the terrorist threat for Australia's emerging "multicultural debate".[21] In relation to the latter field, scholars have also examined the challenges and opportunities of counter-terrorism policing in diverse communities.[22]

The majority of publications, however, focus on the implications of 9/11 for Australia's defence and foreign policy. Scholars examine Australia's "security discourse" in the post-9/11 era,[23] and explore the consequences of the "war on terror" for Australian strategic and defence policy.[24] A good deal of research in this regard is concerned with the future of Australia's alliance with the United States[25] and the relationship between the former leaders of the two countries – Prime Minister Howard and President Bush – in the wake of the 9/11 attacks.[26] In addition, some scholars have

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[19] Jenny Hocking, *Terror Laws – ASIO, Counter-Terrorism and the Threat to Democracy* (Sydney: University of New South Wales Press, 2004). In essence, this book develops arguments first expressed in Jenny Hocking, *Beyond Terrorism: The Development of the Australian Security State* (Sydney: Allen & Unwin, 1993). Parts of the book were published as Jenny Hocking, "Counter-Terrorism and the Criminalisation of Politics: Australia's New Security Powers of Detention, Proscription and Control," *Australian Journal of Politics and History* 49, no. 3 (2003): 355-71.

[20] Graeme Hugo, "Australian Immigration Policy: The Significance of the Events of September 11," *International Migration Review* 36, no. 1 (2002): 1-22; James Jupp, "Terrorism, Immigration, and Multiculturalism: The Australian Experience," <http://www.utexas.edu/cola/centers/european_studies/_files/pdf/immigration-policy-conference/jupp.pdf>.

[21] Mark Lopez, "On the State of Australian Multiculturalism and the Emerging Multicultural Debate in Australia," *People and Place* 13, no. 3 (2005): 33-41; Nahid Kabir, "Muslims in Australia: The Double Edge of Terrorism," *Journal of Ethnic and Migration Studies* 33, no. 8 (2007): 1277-98.

[22] David Wright-Neville, Sharon Pickering and Jude McCulloch, *Counter-Terrorism Policing in Diverse Communities* (New York: Springer 2008).

[23] Matt McDonald, "Constructing Insecurity: Australian Security Discourse and Policy post-2001," *International Relations* 19, no. 3 (2005): 297-320; Matt McDonald, "Be Alarmed? Australia's Anti-terrorism Kit and the Politics of Security," *Global Change, Peace & Security* 17, no. 2 (2005): 171-89.

[24] Alan Dupont, *Transformation or Stagnation? Rethinking Australia's Defence*, SDSC Working Paper no. 374 (Canberra: SDSC/ANU, 2003); Bruce R. Vaughn, "Australia's Strategic Identity Post-September 11 in Context: Implications for the War against Terrorism," *Contemporary Southeast Asia* 26, no. 1 (April, 2004): 116-39; Clive Williams, "Australian Security Policy Post-11 September," *Australian Journal of International Affairs* 56, no. 1 (2002): 13-21; Australian Strategic Policy Institute, *Beyond Baghdad: ASPI's Strategic Assessment 2004* (Canberra: ASPI, 2004).

[25] Joseph M. Siracusa, "John Howard, Australia, and the Coalition of the Willing," *Yale Journal of International Affairs* 1, no. 2 (2006): 39-49; Hugh White, "Mr Howard goes to Washington: The US and Australia in the Age of Terror," Comparative Connections, Pacific Forum CSIS, 2003; Tony Kevin, "Australian Foreign Policy at the Crossroads," *Australian Journal of International Affairs* 56, no. 1 (2002): 31-37.

[26] Donald Debats, Tim McDonald and Margaret-Ann Williams, "Mr Howard Goes to Washington: September 11, the Australian-American Relationship and Attributes of Leadership," *Australian Journal of Political Science* 42, no. 2 (2007): 231-51; Anne Summers, *The Day That Shook Howard's World*, 17 February 2007, <http://www.annesummers.com.au/documents/smh070217.pdf.>

analysed the implications of 9/11 and terrorism for "regional security".[27] To this end, the "evolving terrorist threat" in Southeast Asia is submitted to closer scrutiny.[28] Some scholars focus on "militant Islam" in Southeast Asia generally, while some focus on specific "terrorist" organisations in particular.[29] Jemaah Islamiyah, the organisation responsible for the 2002 Bali bombings and other attacks in Indonesia, receives particular attention.[30]

Although the terrorism threat in Southeast Asia is discussed in some detail, very few scholars question whether Australia's *mainland* is (or was) subject to a terrorism threat, and if so, what the nature and scope of that threat is (or was).[31] In fact, commentary on this issue is limited to online and print media contributions with some commentators questioning the significance of the terrorist threat[32] and others portraying it as the "biggest security challenge to Australian law enforcement and to security and intelligence services."[33] Nevertheless, a detailed academic study is yet to be published. This thesis intends to fill this gap. One of its main rationales is a concern that the policy and academic discourse on the subject matter has generally treated the terrorism threat to Australia as a given. However, a central argument of this thesis is that any analysis of counter-terrorism policy and law should begin with a realistic threat assessment. This is what appears to be missing in Australia to this day.

This thesis thus intends to provide a contribution to the emerging literature on international terrorism since 9/11 and corresponding national (and international) responses. New research on the post-9/11 domestic response to terrorism in Western liberal democracies has overwhelmingly focused on the United States,[34] and, to a lesser extent, the United Kingdom[35] and several other key

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[27] Marika Vicziany, David Wright-Neville, and Peter Lentini (eds.), *Regional Security in the Asia Pacific: 9/11 and After* (Northampton, MA: Edward Elgar, 2004); For Pacific, see, e.g., Beth K. Greener-Barcham and Manuhuia Barcham, "Terrorism in the South Pacific? Thinking Critically about Approaches to Security in the Region," *Australian Journal of International Affairs* 60, no. 1 (2006): 67-82.

[28] Peter Chalk and Carl Ungerer, *Neighbourhood Watch: The Evolving Terrorist Threat in Southeast Asia* (Canberra: Australian Strategic Policy Institute, 2008-06); Paul J. Smith (ed.), *Terrorism and Violence in Southeast Asia: Transnational Challenges to States and Regional Stability* (Armonk, NY: M.E. Sharpe, 2004); David Martin Jones, Michael L. R. Smith and Mark Wedding, "Looking for the Pattern: Al Qaeda in Southeast Asia – The Genealogy of a Terror Network," *Studies in Conflict and Terrorism* 26, no. 4 (2003): 443-57;

[29] See, e.g., Zachary Abuza, *Militant Islam in Southeast Asia: Crucible of Terror* (Boulder, CO: Lynne Rienner, 2003); Aldo Borgu and Greg Fealy, *Local Jihad: Radical Islam and Terrorism in Indonesia* (Canberra: Australian Strategic Policy Institute, 2005).

[30] Sidney Jones, "The Changing Nature of Jemaah Islamiyah," *Australian Journal of International Affairs* 59, no. 2 (2005): 169-78; Greg Barton, *Jemaah Islamiyah: Radical Islam in Indonesia* (Singapore: Singapore University Press, 2005); Brek Bately, *The Complexities of Dealing with Radical Islam in Southeast Asia: A Case Study of Jemaah Islamiyah*, Canberra Papers on Strategy and Defence no. 149 (Canberra: SDSC/ANU, 2003).

[31] Andrew O'Neil is one of the few scholars arguing to keep the terrorist threat in perspective. See, e.g., Andrew O'Neil, "Keeping the Contemporary Threat Environment in Perspective," *Australian Review of Public Affairs*, 31 May 2004, <http://www.australianreview.net/digest/2004/05/oneil.html>.

[32] Paul Dibb, "No reason to live in climate of fear," *The Australian* (Sydney), 6 February 2007.

[33] Rohan Gunaratna, "Homegrown terrorism," *ABC News (Online)*, 5 June 2007; <http://www.abc.net.au/news/stories/2007/06/05/1943497.htm>.

[34] See, inter alia, David Cole and James X. Dempsey, *Terrorism and the Constitution: Sacrificing Liberties in the Name of National Security* (New York: New Press, 2002); Cynthia Brown (ed.), *Lost Liberties: Ashcroft and the Assault on*

European states.[36] This thesis focuses on the Australian experience. One of its key values lies in the fact that it focuses on the legal and policy responses to international terrorism of a country that is a major ally of the United States and the United Kingdom in the so-called War on Terror but which has neither experienced a terrorist attack on its soil since 9/11, nor has had a significant history of political violence.

Key Research Questions

The above review of relevant literature in the field of law and political science gives rise to a number of unanswered questions. These include the following:

- What is the nature and scope of the threat of terrorism to Australia?
- How has the Australian government under the leadership of Prime Minister Howard portrayed and explained this threat to the public?
- Has the Australian government's domestic response to the threat of terrorism been proportional to that threat?
- In particular, has the Australian government demonstrated that its anti-terrorism legislation was suitable, necessary and appropriate to counter the threat?
- Has Australia's domestic counter-terrorism law and policy been effective?
- What is the impact of Australia's domestic counter-terrorism law and policy?

This set of questions served as the organising principle of the research undertaken for the thesis which is structured accordingly.

Personal Freedom (New York: New Press, 2003); Eric A. Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (Oxford: Oxford University Press, 2007); Audrey Kurth Cronin, "Rethinking Sovereignty: American Strategy in the Age of Terrorism", *Survival* 44, no. 2 (2002): 119-39.

[35] For legal analyses of the United Kingdom's response see, e.g., Clive Walker, *Blackstone's Guide to the Anti-Terrorism Legislation*, (Oxford: Oxford University Press, 2nd ed. 2009); Clive Walker, "Intelligence and Anti-terrorism Legislation in the United Kingdom," *Crime, Law & Social Change* 44, no. 4-5 (2005): 387-422; Clive Walker, "Keeping Control of Terrorists without Losing Control of Constitutionalism," *Stanford Law Review* 59, no. 5 (2007): 1395-1463. More generally see, inter alia, Jon Moran & Mark Phythian (eds.), *In the Shadow of 9/11: Intelligence, Security and Policing in the UK's War on Terror* (Basingstoke: Palgrave Macmillan, 2008); Paul Wilkinson (ed.), *Homeland Security in the UK: Future Prepardness for Terrorist Attacks since 9/11* (London: Routledge, 2007),

[36] See, e.g., Christoph J.M. Safferling, "Terror and Law: German Responses to 9/11," *Journal of International Criminal Justice* 4, no. 5 (2006): 1152-65; Peter Shearman and Matthew Sussex (eds.), *European Security after 9/11* (Aldershot: Ashgate, 2004); Jeremy Shapiro and Bénédicte Suzan, "The French Experience of Counter-terrorism," *Survival* 45, no. 1 (2003): 67-98.

Methodology

The theoretical framework used in the thesis draws on the scholarship on the liberal democratic response to terrorism as developed by early scholars like Paul Wilkinson,[37] Grant Wardlaw,[38] Alex P. Schmid[39] and Ronald Crelinsten[40] and subsequently refined by scholars like Magnus Ranstorp[41] and Peter Chalk.[42] These scholars have argued that the primary objective of any counter-terrorist strategy in liberal democracies must be the maintenance of liberal democracy and the protection of human rights and the rule of law. As Australia is one of the leading liberal democracies, it is appropriate to submit the Australian response to the threat of terrorism to analysis in this context.

A supplementary conceptual framework is borrowed from the literature on the proportionality principle as a principle of regulative public policy and administration.[43] This principle does not, in itself, produce substantive outcomes or answers to legal and policy problems. Rather, it is an analytical procedure which leads to the formulation of an opinion concerning policy implementation and which usually deals with tensions between two pleaded legal or political values and/or public policy goals.[44] This thesis is the first study to employ a proportionality framework as a method for the analysis of Australian counter-terrorism law and policy.

As far as the analysis of the threat of terrorism is concerned, the thesis employs the typology proposed by Philippe Errera and adapts it to the Australian context.[45] This typology is based on the premise that while Al Qaeda may be most accurately described as an "ideology" rather than an

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[37] See, e.g., Paul Wilkinson, *Terrorism and the Liberal State* (New York: New York University Press, 2nd ed. 1986); Paul Wilkinson, *Terrorism versus Democracy*, (London: Frank Cass, 2001).

[38] Grant Wardlaw, *Political Terrorism: Theory, Tactics and Counter-Measures*, (Cambridge: Cambridge University Press, 2nd ed. 1989).

[39] Alex P. Schmid and Ronald D. Crelinsten (eds.), *Western Responses to Terrorism* (London: Frank Cass, 1993).

[40] Ronald D. Crelinsten, Danielle Laberge-Altmejd and Denis Szabo, *Terrorism and Criminal Justice* (Lexington, MA: Lexington Books, 1978); Ronald D. Crelinsten, "Terrorism, Counter-Terrorism and Democracy: The Assessment of National Security Threats," *Terrorism and Political Violence* 1, no. 2 (1989): 242-69.

[41] Ami Pedahzur and Magnus Ranstorp, "A Tertiary Model for Countering Terrorism in Liberal Democracies: The Case of Israel," *Terrorism and Political Violence* 13, no. 2 (2001): 1-26.

[42] Peter Chalk, "The Liberal Democratic Response to Terrorism", *Terrorism and Political Violence* 7, no. 4 (1995): 10-44. Peter Chalk, *West European Terrorism and Counter-Terrorism: The Evolving Dynamic* (Houndsmill: Macmillan Press, 1996).

[43] See, e.g., Evelyn Ellis, *The Principle of Proportionality in the Laws of Europe* (Oxford: Hart Publishing, 1999); Alec Stone Sweet and Jud Mathews, "Proportionality Balancing and Global Constitutionalism," *Columbia Journal of Transnational Law* 47, no. 1 (2008): 73, 75. Sabine Michalowski and Lorna Woods, *German Constitutional Law: The Protection of Civil Liberties* (Aldershot: Ashgate, 1999) 69-93; Christoph Engel, *The Constitutional Court - Applying the Proportionality Principle - as a Subsidiary Authority for the Assessment of Political Outcomes*, Max Planck Institute Collective Goods Preprint No. 2001/10; Helmut Goerlich, "Fundamental Constitutional Rights: Content, Meaning and General Doctrines," in Ulrich Karpen (ed.), *The Constitution of the Federal Republic of Germany* (Baden-Baden, Nomos, 1988) 45-65.

[44] Mattias Kumm, "Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice," *International Journal of Constitutional Law* 2, no. 3 (2004): 574-96.

[45] Philippe Errera, "Three Circles of Threat," *Survival* 47, no. 1 (2005): 71-88.

"organisation" or network", such classification is hardly constructive for the purposes of identifying the source of contemporary international terrorism. As a consequence, Errera employs the image of "three circles" to describe and categorise the different threat dimensions.

The thesis primarily used desktop research. In addition, several interviews were conducted with leading scholars in the field in Australia, Europe and the United States. Additional research was undertaken at the libraries of the Australian National University in Canberra, the University of New South Wales in Sydney and St. Andrews University (Scotland) as well as the Bavarian State Library in Munich, Germany. The thesis is generally informed by the author's work as a human rights officer (anti-terrorism) at the Organisation for Security and Cooperation in Europe and by his background in German law and international law.

The approach adopted in the thesis combines legal, political and philosophical methods of analysis. As far as sources are concerned, the thesis analyses primary material which include relevant governmental and parliamentary (committee) reports, speeches by Australian and United States government representatives, parliamentary debates, policy reports by Australian governmental agencies as well as annual reports by Australia's domestic intelligence agency. Moreover, the thesis undertakes an analysis of key pieces of anti-terrorism legislation adopted in Australia since 2002. Secondary sources are consulted as appropriate and with a view to developing the conceptual framework of the thesis.

Thesis Outline

The thesis contains six thematic chapters and a concluding chapter. Chapter 2 provides a theoretical framework for the analysis of Australia's domestic response to the threat of terrorism. It identifies key principles of the traditional liberal democratic response to terrorism and enquires whether these principles apply to the response to contemporary threats of terrorism. It is argued that the protection of human rights and civil liberties and maintenance the rule of law continues to form key imperatives for a counter-terrorism strategy in the post-9/11 era. The chapter subsequently addresses the question of whether, and to what extent, there needs to be a trade-off between civil liberties and human rights on the one hand, and "security" on the other. In this context, it provides a critique of prevalent counter-terrorism rhetoric employed by officials and academics that claims that a "balance" must be struck between "liberty" and "security". It is argued that the balancing paradigm is at best misleading and at worst structurally wrong. The chapter concludes by proposing an alternative framework to be applied to the analysis of "liberty" and "security" in the context of

counter-terrorism. It is submitted that rather than employing a balancing approach, policy-makers need to apply a strict proportionality test. It is argued that the application of a proportionality approach to counter-terrorism law and policy in Australia can be justified by reference to existing legal and public policy principles.

Chapter 3 examines how the perceived threat of terrorism was assessed and presented by the Howard government in official statements and public comments as well as in publicly available documents and reports. The analysis focuses on statements made and reports issued in the years 2001 to 2007. Particular attention is drawn to the 2004 White Paper on Transnational Terrorism and the 2006 Protecting Australia against Terrorism Paper. In many ways these documents encapsulated some of the key arguments put forward by Howard government as to why Australia was believed to be a target for terrorist attacks. Other reports that are analysed include the annual reports to Parliament by Australia's domestic intelligence agency, the Australian Security Intelligence Organisation (ASIO), and the 2003 White Paper on Foreign Affairs and Trade entitled "Advancing the National Interest". The chapter demonstrates that the Howard government's account of the threat of international terrorism drew heavily on the rhetoric of the Bush administration, both as far as content and explicit metaphors were concerned. It argues that the publicly available assessments in Australia were fundamentally flawed and subject to a range of considerable misunderstandings and exaggerations.

Chapter 4 provides a re-assessment of the nature and scope of the current threat of international and its implications for Australia. It demonstrates that the threat of contemporary international terrorism can be generally divided into three distinct yet interrelated circles. In the light of these findings, the chapter then analyses the threat of terrorism to Australia. It examines in particular who and/or what is threatened by whom and suggests that a clear distinction should be drawn between threats to Australia and Australian interests overseas. It is argued that, from an objective perspective, terrorism does not constitute a significant threat to Australia's *mainland.* Nonetheless, the chapter suggests that given the largely subjective fear of terrorism among the Australian public, there was a need for the Australian government to develop appropriate counter-terrorism law and policy. This chapter argues that any such policy, however, needed to be carefully calibrated to meet the threat without undue restrictions or curtailments of civil liberties and the rule of law.

Chapters 5 to 7 focus on the domestic response to the threat of terrorism in Australia – a response that has been predominantly legal with the enactment of no less than 42 pieces of legislation over a period of six years. Chapter 5 concentrates on the immediate aftermath of 9/11, specifically on the time frame of late 2001 to early 2003. In this period, the Howard government introduced a wide

range of new terrorism offences as well as enhanced powers for the Australian intelligence and law enforcement agencies. The new laws introduced a definition of "terrorist act" and contain criminal sanctions for involvement with a terrorist organisation, including for providing support or funding, recruiting members, directing its activities or being a member. In addition, Australia's domestic intelligence agency, ASIO, was given unprecedented powers that enable it to detain persons not suspected of any offence for up to seven days without charge or trial. The chapter argues, however, that several legislative changes were unwarranted by the level of threat, that they remain disproportionate and that raise concerns in relation to Australia's obligations under international law.

Chapter 6 focuses on the politicisation of Australia's counter-terrorism law and policy. It seeks to demonstrate that many legislative changes were motivated by the Howard government's aspirations for partisan political benefit rather than by legal principle. The chapter mainly focuses on the period of mid-2003 to late-2005 which saw the Government extending the legislative framework in response to incidents involving individuals suspected of terrorism activity. Attention is drawn to the cases of Jack Roche, Willie Brigitte, Bilal Kazal as well as the Australian government's approach to counter-terrorism law and policy in the aftermath of the 2005 London bombings. In this context the discussion also focuses on the manner in which the Government introduced highly controversial control order and preventative detention regimes. It is argued that rather than demonstrating a coherent approach to legislative reform, the Howard government's counter-terrorism law and policy was distinctive for its overt political character.

Chapter 7 focuses on the impact and effectiveness of Australia's counter-terrorism law and policy. It discusses the cases of the two Australian Guantanamo Bay detainees, Mamdouh Habib and David Hicks, and argues that these cases demonstrate that the Howard government was prepared to sacrifice respect for fundamental legal and moral principles in order to achieve (perceived) political gain. Attention is then drawn to the impact of the Government's terrorism-related rhetoric, policy and law on domestic counter-terrorism practice. The chapter examines the cases of Izhar ul-Haque and Mohammed Haneef as well as the trial of Abdul Nacer Benbrika and his associates. It is argued that these cases highlighted many of the concerns about Australia's counter-terrorism law and policy which previously had existed only in the abstract. The chapter then analyses the impact of the anti-terrorism laws on Australia's Muslim community. Finally, it considers the effectiveness of Australia's domestic counter-terrorism law and policy and discusses some problematic long-term consequences and effects of the anti-terrorism legislation.

The thesis concludes by drawing together the findings of Chapters 2 to 7. It argues that Australia's domestic response to terrorism eroded fundamental rule of law principles such as accountability and scrutiny of authority, due process, separation of powers, and coherent justification for the introduction of intrusive measures. It suggests that this erosion was reflected in the attitudes of the legislative proponents as well as apparent in the legislative amendments themselves. At no point did the Government demonstrate adequately that the changes in law were proportional to the threat faced. Also, it remains unclear whether these changes have in fact been effective in the fight against terrorism.

2

A THEORETICAL FRAMEWORK FOR THE ANALYSIS OF AUSTRALIA'S DOMESTIC RESPONSE TO THE THREAT OF TERRORISM

I. Introduction

II. The Theoretical Framework: The Liberal Democratic Response to Terrorism

1. The Different Response Models

2. The Key Imperative: Maintaining Democracy and the Rule of Law

3. Do these Principles Apply to the Liberal Democratic Response to Contemporary Terrorism?

a) A Principles Response to the Threat of International Terrorism
b) The Post-9/11 Debate on Countering Terrorism and Restricting Rights and Liberties

III. "Balancing" Liberty with Security?

1. Philosophical Objections

a) The Interrelationship between Liberty and Security
b) The Dual Effect of Increasing the Powers of the State
c) Consequentialism in the Realm of Civil Liberties?

2. Rights-based Objections

a) Security as Individual Right or "State Purpose"?
b) Conflicting Rights and the Right to Life

3. Strategic Objections – Problematic Long-term Consequences

4. Practical Objections

IV. The Need for Proportionality

1. Proportionality as a Principle of Law, Public Policy and Good Governance

2. The Proportionality Test in Regulative Public Policy and Administration

3. Implications for the Analysis of the Australian Response to the Threat of Terrorism

V. The Proportionality Approach Used in this Thesis

I. Introduction

Terrorism violates human rights and constitutes a serious challenge for liberal democracies. Not because terrorists can defeat them in war, but because their actions can potentially undermine the domestic social contract of the state by undermining its ability to protect its citizens from attack. As Audrey Kurth Cronin has noted, "the greatest danger [for liberal democracies] is not defeat on the battlefield but damage to the integrity and value of the state.[46] While the events of 9/11 and the subsequent attacks around attributed to Islamist terrorists have led to a renewed focus on the threats and challenges associated with terrorism, the phenomenon is not new. Throughout history, states have had to deal with acts political violence and terrorism. Democracies, perhaps, have been particularly vulnerable to campaigns of terrorism because of their openness, limits on government and restrains imposed by the rule of law. As Paul Wilkinson has observed, "it is part of the price we must pay for our democratic freedoms that some may choose to abuse these freedoms for the purposes of destroying democracy, or some other goal."[47]

The objective of this chapter is to provide a theoretical framework for the analysis for Australia's domestic response to the threat of terrorism. First, it will identify key principles of the traditional liberal democratic response to terrorism and enquire whether these principles apply to the response to contemporary threats of terrorism. It is argued that the protection of human rights and civil liberties and maintenance of the rule of law continues to form key imperatives for a counter-terrorism strategy in the post-9/11 era.[48] The chapter subsequently addresses the question whether, and to what extent, there needs to be a trade-off between civil liberties and human rights on the one hand, and security on the other. In this context, it provides a critique of prevalent counter-terrorism rhetoric that claims that a "balance" must be struck between liberty and security. It is argued that the balancing paradigm is at best misleading and at worst structurally wrong. Accordingly, the chapter challenges the validity of the balancing argument on four grounds: philosophical, rights-based, strategic and practical. The chapter concludes by proposing an alternative framework to be applied to the analysis of liberty and security in the context of counter-terrorism. It is submitted that rather than employing a balancing approach, policy-makers need to apply a strict proportionality

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[46] Audrey Kurth Cronin, "Rethinking Sovereignty: American Strategy in the Age of Terrorism", *Survival* 44, no. 2 (2002): 134.

[47] Paul Wilkinson, *Terrorism versus Democracy – The Liberal State Response* (London: Frank Cass, 2001), 220-224; see also Alex P. Schmid, "Terrorism and Democracy", in *Western Responses to Terrorism*, eds. Alex P. Schmid and Ronald D. Crelinsten (London: Frank Cass, 1993), 14-25; Peter C. Sederberg, *Terrorist Myths: Illusion, Rhetoric and Reality*, (Englewood Cliffs, NJ: Prentice Hall, 1989), 161-64.

[48] Although often used as synonyms, civil liberties need to be distinguished from human rights. See, e.g., Conor A. Gearty, "Reflections on Civil Liberties in an Age of Counterterrorism," *Osgoode Hall Law Journal* 41, no. 2-3 (2003): 185-210. Gearty argues that too broad a deployment of the language of civil liberties can lead to the importance of civil liberties being underappreciated by the wider public.

test. It is argued that the application of this proportionality approach to counter-terrorism law and policy in Australia can be justified by reference to existing legal and public policy principles.

II. The Theoretical Framework: The Liberal Democratic Response to Terrorism

1. The Different Response Models

For many years, scholars have been preoccupied with the question how liberal democracies should respond to the challenges associated with terrorism.[49] Examining various pre-9/11 terrorism emergencies and corresponding governmental responses, scholars tend to differentiate between two basic types of approaches. These can be generally categorised into the "soft line" and the "hardline" approach.[50] The two most common forms of the "soft line" or "conciliatory response" are accommodation (including direct negotiation with terrorists and the possibility of giving in to specific demands) and reform (usually addressing the grievances raised by terrorists without directly dealing with the terrorists themselves).[51] The "hardline" response tends to be categorised into the legal-repressive response and the military response, or what a number of authors call the "criminal justice model" and "war model" respectively.[52] In the "war model" response counter-terrorism measures adhere to the rules of war while treating terrorism as a special form of war or low-intensity conflict. Terrorism is viewed as an act of revolutionary or guerrilla warfare with the

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[49] See, inter alia, Paul Wilkinson, *Terrorism and the Liberal State* (New York: New York University Press, 2nd ed. 1986); Paul Wilkinson, *Terrorism versus Democracy*, (London: Frank Cass, 2001); Grant Wardlaw, *Political Terrorism: Theory, Tactics and Counter-Measures*, (Cambridge: Cambridge University Press, 2nd ed. 1989); David A. Charters (ed.), *The Deadly Sin of Terrorism: Its Effect on Democracy and Civil Liberty in Six Countries* (Westport, CT.: Greenwood Press, 1994); Peter Chalk, "The Liberal Democratic Response to Terrorism", *Terrorism and Political Violence* 7, no. 4 (1995): 10-44; Peter Chalk, "EU Counter-Terrorism, the Maastricht Third Pillar and Liberal Democratic Acceptability," *Terrorism and Political Violence* 6, no. 2 (1994): 103-45; Peter Chalk, *West European Terrorism and Counter-Terrorism: The Evolving Dynamic* (Houndsmill: Macmillan Press, 1996); G. Davidson Smith, *Combating Terrorism* (London: Routledge, 1990); Fernando Reinares, "Democratic Regimes, Internal Security Policy and the Threat of Terrorism," *Australian Journal of Politics and History* 44, no. 3 (1998): 351-71; Charles Dunlop, "The Police-ization of the Military," *Journal of Political and Military Sociology* 27, no. 2 (1999): 217-32; Menachem Hofnung, *Democracy, Law and National Security* (Aldershot: Dartmouth Press, 1996); John E. Finn, *Constitutions in Crisis: Political Violence and the Rule of Law* (Oxford: Oxford University Press, 1991); Peter Janke (ed.), *Terrorism and Democracy* (Houndsmill: Macmillan Press, 1992); Paul Wilkinson, "Fighting the Hydra: International Terrorism and the Rule of Law," in Noel O'Sullivan (ed.) *Terrorism, Ideology and Revolution: The Origins of Modern Political Violence* (Boulder, CO: Westview Press, 1986) 210-228.

[50] See, e.g., Alex P. Schmid, "Force or Conciliation? An Overview of Some Problems Associated with Current Anti-Terrorist Response Strategies," *Violence, Aggression and Terrorism* 2, no. 2 (1988): 149-78; Ronald D. Crelinsten and Alex P. Schmid, "Western Responses to Terrorism: A Twenty-Five Year Balance Sheet," in Alex P. Schmid and Ronald D. Crelinsten (eds.), *Western Responses to Terrorism* (London: Frank Cass, 1993) 307-40.

[51] Ronald D. Crelinsten and Alex P. Schmid, "Western Responses to Terrorism: A Twenty-Five Year Balance Sheet," at 309; see also Sederberg, *Terrorist Myths: Illusion, Rhetoric and Reality*, 150-56.

[52] Ronald D. Crelinsten, "The Relationship between the Controller and the Controlled," in Paul Wilkinson and Alasdair M. Stewart (eds.), *Contemporary Research on Terrorism* (Aberdeen: Aberdeen University Press, 1987) 3-23; Ronald D. Crelinsten, "The Discourse and Practice of Counter-Terrorism in Liberal Democracies," *Australian Journal of Politics and History* 44, no. 1 (1998): 389-413; see also Ami Pedahzur and Magnus Ranstorp, "A Tertiary Model for Countering Terrorism in Liberal Democracies: The Case of Israel," *Terrorism and Political Violence* 13, no. 2 (2001): 1-26.

onus of response being placed on the military and the use of special forces, retaliatory strikes or campaigns of retribution.[53] Most governments of liberal democracies, however, have been reluctant to adopt the "war model" for fear of implicitly acknowledging the political role of the terrorist organisation, and thereby giving certain legitimacy to its actions. Moreover, as Peter Chalk has observed, the powers of military forces in a civilian setting tend to be ill-defined and could well place individual soldiers in positions of personal authority which could have serious implications for civil liberties.[54]

The typical approach adopted by democracies in Europe and North America predominately followed the "criminal justice model".[55] This model views terrorism as a crime where the onus of response is placed within the boundaries of the state's criminal legal system. In light of some European experiences of terrorist violence, Jeannou Lacaze put it as follows in a 1994 report on European terrorism prepared for the European Parliament's Committee on Foreign Affairs and Security:

> Terrorism is a peacetime problem, which must be tackled using peacetime remedies. Even if one is firmly convinced that this is a new type of war being waged against our remedies, there is no justification for applying wartime legislation. This would leave the way open for legal abuses, whose short-term consequences would be as serious terrorism itself... Instead the full force of law must be brought into play on the basis of existing charges to ensure that those responsible are no longer a threat to society. A terrorist is first and foremost a common criminal and should be convicted as such.[56]

The most common measures adopted in the framework of the criminal justice model have been the creation of special legislation, the increasing of police powers, changes in rules of evidence and procedure during trials and, in some cases, the creation of special courts or jurisdictions as well as the creation of special regimes of imprisonment for convicted terrorists. The specific characteristics of the response were generally dependant on the nature of the terrorist emergency in question as well as on country-specific legal and political traditions. In Germany and Italy in the 1970s and 80s, for instance, historical developments and constitutional constraints led to an approach to counter left-wing terrorism predominantly through traditional criminal justice means.[57] In Northern Ireland,

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[53] Ronald D. Crelinsten, "Terrorism, Counter-Terrorism and Democracy: The Assessment of National Security Threats," *Terrorism and Political Violence* 1, no. 2 (1989): 242-69.

[54] Peter Chalk, "The Liberal Democratic Response to Terrorism", *Terrorism and Political Violence* 7, no. 4 (1995): 10, 17.

[55] Ronald D. Crelinsten, Danielle Laberge-Altmejd and Denis Szabo, *Terrorism and Criminal Justice* (Lexington, MA: Lexington Books, 1978).

[56] Jeannou Lacaze, *Report of the Committee on Foreign Affairs and Security on Terrorism and its Effects on Security in Europe* (European Parliament Session Documents, A3-0058/94, 2 February 1994), 8.

[57] For analyses of the German response to left-wing terrorism see, e.g., Hans-Josef Horchem, "Terrorism and Government Response: The German Experience', *Jerusalem Journal of International Relations* 4, no. 3 (1980) 43-55; Peter H. Merkl, "West German Left-Wing Terrorism," in Matha Crenshaw (ed.) *Terrorism in Context* (Philadelphia, PA: Pennsylvania

on the other hand, the adoption of special anti-terrorism legislation was accompanied by the establishment of special courts, the so-called Diplock courts (without jury), as well as an increased militarisation of the police and the deployment of the military.[58]

The different responses to terrorism emergencies in Germany, Italy and Northern Ireland demonstrate that the application of theory to reality is difficult and complex, in particular, because the boundaries of the criminal justice model somewhat suffer from ambiguity. As Ami Pedahzur Magnus Ranstorp have noted, it "often appears that the attempt to adhere to the criminal justice model leads policy makers in liberal democratic states to an almost unrestrained elasticity of its boundaries."[59] These boundaries are certainly overstepped when agents of the State begin to shoot suspects without bothering to arrest them, or to mistreat them during interrogation in order to force confessions. As Ronald Crelinsten and Alex Schmid have observed, by employing such measures the State has "moved far along the road to a regime of terror."[60] The fact that unacceptable measures can be taken by either the police or the military highlights the problems surrounding the use of force in any counter-terrorism strategy, be it a criminal justice model or a war model. It is generally considered a key imperative of any liberal democratic counter-terrorism strategy to maintain democracy and the rule of law.

2. The Key Imperative: Maintaining Democracy and the Rule of Law

There is general consensus in the literature that there is no universally applicable counter-terrorism policy for democracies as every conflict involving terrorism has its own unique characteristics.[61]

State University Press, 1995) 160-210; Stephen M. Sobieck, "Democratic Responses to International Terrorism in Germany," in David A. Charters (ed.), *The Deadly Sin of Terrorism: Its Effect on Democracy and Civil Liberty in Six Countries* (Westport, CT: Greenwood Press, 1994) 43-72. For analyses of the Italian response to left-wing terrorism, see, e.g., Donna della Porta, "Institutional Responses to Terrorism: The Italian Case," *Terrorism and Political Violence* 4, no. 4 (1992): 155-71; Alison Jamieson, "The Italian Experience," in H. H. Tucker (ed.), *Combating the Terrorists: Democratic Responses to Political Violence* (New York: Facts on File, 1988) 113-54; Leonard Weinberg and William L. Eubank, *The Rise and Fall of Italian Terrorism* (Boulder, CO: Westview Press, 1987).

[58] For analyses of the response to terrorism in Northern Ireland, see, e.g., James Dingley (ed.), *Combating Terrorism in Northern Ireland* (London: Routledge, 2008); Gerard Hogan and Clive Walker, *Political Violence and the Law in Ireland* (Manchester: Manchester University Press, 1989); John E. Finn, "Public Support for Emergency (Anti-Terrorist) Legislation in Northern Ireland: A Preliminary Analysis," *Studies in Conflict & Terrorism* 10, no. 2 (1987): 113-24; Conor A. Gearty and John A. Kimbell, *Terrorism and the Rule of Law: A Report on the Law Relating to Political Violence in Great Britain and Northern Ireland* (London: CLRU, School of Law, King's College, 1995).

[59] Ami Pedahzur and Magnus Ranstorp, "A Tertiary Model for Countering Terrorism in Liberal Democracies: The Case of Israel," *Terrorism and Political Violence* 13, no. 2 (2001): 3; Pedahzur and Ranstorp presented the "expanded criminal justice model", whose primary function was to mediate between the two models in "grey areas".

[60] Crelinsten and Schmid, "Western Responses to Terrorism: A Twenty-Five Year Balance Sheet", 335.

[61] See, e.g., Paul Wilkinson, *Terrorism versus Democracy*, (London: Frank Cass, 2001), 229-30; Grant Wardlaw, "The Democratic Framework," in David A. Charters (ed.), *The Deadly Sin of Terrorism: Its Effect on Democracy and Civil Liberty in Six Countries* (Westport, CT: Greenwood Press, 1994) 5-12; Ronald D. Crelinsten, "Terrorism, Counter-Terrorism and Democracy: The Assessment of National Security Threats," *Terrorism and Political Violence* 1, no. 2 (1989): 242-69.

Nevertheless, earlier scholars commonly agreed that liberal democracies needed to respond with "an absolute determination to defeat terrorism within the framework of the rule of law and the democratic process."[62] A key component of any counter-terrorism campaign was considered to be an "intensified effort to bring terrorists to justice by prosecution and conviction before courts of law."[63] Writing in 1986, Paul Wilkinson, a pioneer in terrorism studies, elaborated on this imperative in great detail. He noted that:

> The primary objective of counter-terrorist strategy must be the protection and maintenance of liberal democracy and the rule of law. It cannot be sufficiently stressed that this aim overrides in importance even the objective of eliminating terrorism and political violence as such. Any bloody tyrant can 'solve' the problem of political violence to sacrifice all considerations of humanity and to trample down all constitutional and judicial rights.[64]

Wilkinson further considered it "a cardinal principle" for liberal democracies "never to be tempted into using the methods of tyrants and totalitarians" as indiscriminate repression was "totally incompatible with the liberal values of humanity, liberty and justice.[65] He warned that it was thus "dangerous to believe one can 'protect' liberal democracy by suspending liberal rights and forms of government."[66] Wilkinson's conclusions were shared by Grant Wardlaw who has pointed out in 1989 that:

> However serious the threat of terrorism, we must not be tempted to use repressive methods to combat it. To believe that we can 'protect' liberal democracy by suspending our normal rights and methods of government, is to ignore the numerous examples in contemporary history of countries where 'temporary', 'emergency' rule has subsided quickly and irrevocably into permanent dictatorial forms of government.[67]

While it was essential to "avoid the easy move to repression as a counter to terrorism" Wardlaw maintained that it was "equally vital that we do not allow ourselves to be so overcome by our democratic sensibilities that our response is weak and vacillating, and characterised by inaction." In addition to strategic considerations, Wardlaw emphasised the importance of ethical considerations. He noted, in particular, that believing that "depriving citizens of their individual rights and

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[62] Wilkinson, *Terrorism versus Democracy*, 233.
[63] Ibid. 234.
[64] Wilkinson, *Terrorism and the Liberal State*, 125.
[65] Ibid, 126.
[66] Ibid. Wilkinson further notes that even in its most severe crises, a liberal democracy "must seek to remain true to itself, avoiding on the one hand the dangers of sliding into repressive dangerous dictatorship, and on the other the evil consequences of inertia, inaction and weakness, in upholding its constitutional authority and preserving law and order."
[67] Grant Wardlaw, *Political Terrorism: Theory, Tactics and Counter-measures*, (Cambridge: Cambridge University Press, 2nd ed. 1989), 69.

suspending the democratic process is necessary to maintain 'order' is to put oneself on the same moral plane as the terrorists, who believe that 'the end justifies the means'."[68]

In the 1990s, similar arguments were advanced by Irwin Cotler and Peter Chalk. Cotler, for instance, noted that:

> any counter-terrorism law and policy must comport with, and adhere to, the principles of the rule of law and due process, and terrorist suspects must enjoy the right to protection against arbitrary arrest and detention, to protection against discrimination, and to protection against torture and other forms of cruel and degrading punishment or treatment. [69]

Likewise, Peter Chalk argued that "an ability to deal with terrorism in a way that is widely held to be in conformity with established political and judicial principles will, in actuality, strengthen the commitment to uphold democratic institutions and, thus, further isolate and weaken those who seek to destroy them."[70] For Chalk, the liberal democratic response to terrorism had to be based on the three principles of limitation, credibility and accountability.[71] The limitation principle required counter-measures to be "limited and well defined" and not go "beyond what is demanded by the exigencies of the immediate situation."[72] The credibility principle meant that the response had to be "credible" with the government required to provide justification for implementing and maintaining specialist anti-terrorist measures.[73] Lastly, the accountability principle entailed that all counter-terrorism measures – especially those initiated by the intelligence services – needed to be subjected to constant parliamentary supervision and judicial oversight.[74]

3. Do these Principles apply to the Liberal Democratic Response to Contemporary Terrorism?

a) A Principled Response to the Threat of International Terrorism

In the aftermath of the 9/11 attacks on New York and Washington, many commentators claimed that the world had changed "forever" with international terrorism constituting one of the defining

[68] Ibid.
[69] Irwin Cotler, "Towards a Counter-Terrorism Law and Policy," *Terrorism and Political Violence* 10, no. 2 (1998): 1, 4.
[70] See, e.g., Peter Chalk, "The Liberal Democratic Response to Terrorism", *Terrorism and Political Violence* 7, no. 4 (1995): 10, 11.
[71] Peter Chalk, "The Response to Terrorism as a Threat to Liberal Democracy", *Australian Journal of Politics & History* 44, no. 3 (1998): 386-88.
[72] Ibid, 386.
[73] Ibid, 387.
[74] Ibid.

global security challenges of the 21st century.[75] The renewed focus on counter-terrorism law and policy also called into question whether the lessons drawn from previous terrorism emergencies are pertinent to the post-9/11 environment. Indeed, to what extent, if at all, are the principles identified for the liberal democratic response to traditional forms of terrorism applicable to a response to contemporary international terrorism?[76]

The historical, political and security implications of 9/11 notwithstanding, scholars and policy-makers appear to have accepted that the basic tenets of the traditional liberal democratic response continue to apply to responses to contemporary international terrorism. Paul Wilkinson, for instance, considered that these principles were "definitely applicable" as it "would be a very sad retreat from the democratic rule of law if we were to say these rules and principles are suspended."[77] A suspension of the rule of law and fundamental democratic principles, Wilkinson noted, "would really be to give the terrorists a victory which with even the ruthlessness of Al Qaeda they would not be able to secure if we maintained our firm defences [and] an application of the rule of law."[78] On the contrary, the protection of human rights and the rule of law form a key part of a successful counter-terrorism strategy. As Wilkinson explained:

> I think that far from being a kind of alternative to security, human rights protection is actually an essential ally of combating terrorism in a democracy. It must be interlocked with the measures taken to protect. To betray those principles you are actually helping the people who are opposed to democracy, to undermine democracy. Now, it's a much more dangerous period in terms of the level of threat because clearly Al Qaeda is a much more lethal network than we ever faced from traditional terrorism. That doesn't mean that we have to abandon our principles. It means that we must be more determined in maintaining them so that we're not panicked into overreaction. (...) If you stop protecting democracy and simply believe that the war on terror justifies abandoning the democratic processes and legal safeguards then I think one is really doing the terrorists' work for them. We are supposedly protecting more than just our public. We are protecting our values, our institutions. We undermine them, we corrupt them, by saying that the end justifies the means.[79]

These views appear to have been shared by the policymakers responsible for Australia's response to terrorism in the 9/11 era. Speaking in federal Parliament on 17 September 2001, the Australian

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[75] In his Second Reading speech before the Senate concerning the first package of anti-terrorism legislation, the Australian Minister for Justice and Customs, Chris Ellison, stated, for instance, that "the events in the United States on 11 September (...) marked a fundamental shift in the global security environment." Commonwealth of Australia, *Parliamentary Debates*, *Senate*, 24 June 2002, 244 (Chris Ellison). See also Paul Kelly, "How 9/11 changed the world," *The Australian* (Sydney), 8 September 2006; Richard W. Stevenson, "Cheney says 9/11 changed the rules," *New York Times* (New York), 21 December 2005. For thoughtful analysis see, e.g., Robert Jervis, "An Interim Assessment of September 11: What Has Changed and What Has Not?" *Political Science Quarterly* 117, no. 1 (2002): 37-52; Thomas L. Friedman, *Longitudes and Attitudes: Exploring the World after September 11* (New York: Farrar, Straus and Giroux, 2002).

[76] This assumes, of course, that contemporary terrorism is different from "traditional" terrorism.

[77] Personal interview with Professor Paul Wilkinson, St Andrews, 18 December 2004.

[78] Ibid.

[79] Ibid.

Prime Minister, John Howard, for instance, declared that it would be "a terrible, tragic, obscene irony if, in responding to these terrible terrorist attacks, we forsook the very things that we believed had been assaulted."[80] Similarly, the Joint Committee on Intelligence and Security of the Australian parliament recognised the importance of maintaining the rule of law and due process when responding to the threat of terrorism. The Committee noted that:

> There are pragmatic reasons for maintaining the basic principles of the criminal justice model based on the rule of law. The requirement for specificity is to ensure that a person knows what may and may not be done; and, appropriate safeguards minimise the risk of misapplication or unintended consequences that bring the law into disrepute. Laws which are excessive or difficult to understand and to implement increase the actual risk and perception of arbitrariness. While Australian authorities operate at a good standard of professionalism, they are not infallible and normal human error can lead to individual cases of injustice and a false sense of security in the community. History teaches us that while a strong response is necessary, real injustices can be produced by being unmeasured or overzealous.[81]

The imperative of protecting human rights and the rule of law in post-9/11 responses to terrorism have also been recognised at the international level. The former UN Secretary-General Kofi Annan, for instance, has stated at a special meeting of the Security Council's Counter-Terrorism Committee in March 2003 that:

> Our responses to terrorism, as well as our efforts to thwart it and prevent it, should uphold the human rights that terrorists aim to destroy. Respect for human rights, fundamental freedoms and the rule of law are essential tools in the effort to combat terrorism - not privileges to be sacrificed at a time of tension.[82]

Noting that that upholding human rights was not merely compatible with a successful counter-terrorism strategy but rather an essential element in it, Annan pointed out in a 2005 address that:

> Human rights law makes ample provision for strong counter-terrorist action, even in the most exceptional circumstances. But compromising human rights cannot serve the struggle against terrorism. On the contrary, it facilitates achievement of the terrorist's objective – by ceding to him the moral high ground, and provoking tension, hatred and mistrust of government among precise those parts of the population where he is more likely to find recruits.[83]

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[80] Quoted in ABC Radio National, Transcript PM Programme, "Parliament mourns US attacks,"17 September 2001; <http://www.abc.net.au/pm/stories/s368713.htm>.
[81] Parliament of Australia, Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation* (Canberra: AGPS, 2006), 14.
[82] Kofi Annan, *Press Release*, SG/SM/8624; SC/7680, 6 March 2003; <http://www.un.org/News/Press/docs/2003/sgsm8624.doc.htm>.
[83] Kofi Annan, "A Global Strategy for Fighting Terrorism," Address at the Club de Madrid, 10 March 2005; <http://summit.clubmadrid.org/keynotes/a-global-strategy-for-fighting-terrorism.html>.

The importance of protecting human rights and the rule of law while countering terrorism has also been recognised in several resolutions adopted by the UN Security Council. In resolution 1456 (2003), for instance, the Security Council declared that "States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law."[84] Likewise, the UN Global Counter-Terrorism Strategy which was adopted by the General Assembly in September 2006 considered ensuring respect for human rights and the rule as one of four basic pillars of counter-terrorism.[85]

b) The Post-9/11 Debate on Countering Terrorism and Restricting of Rights and Liberties

While there appears to be a general consensus that the protection of democratic principles and the rule of law constitutes a key component of counter-terrorism both before and after 9/11, commentators are nonetheless divided about whether, and to what extent, it was (and is) necessary to curtail civil liberties and human rights in order to combat terrorism effectively. On one side the claim is made by those defending incursive counter-measures that terrorists regard liberal democracy itself as the enemy. The unprecedented threat to "our way of life", therefore, warrants restrictions of civil liberties and human rights. It is imperative to make sure that the very mechanisms protecting the individual from excessive state power do not hamper the government's ability to respond effectively to the threat. Civil liberties and human rights, so the argument runs, were political conveniences for enjoyment in times of peace.[86] They should not, however, constitute restraining yardsticks for government in times of emergency and national danger.[87]

On the other side commentators maintain that it is particularly in times of crisis that the liberal democratic state must adhere strictly to its defining principles.[88] Rights would lose all effect if they were easily revocable in situations of necessity.[89] Besides, to believe that restricting human rights and civil liberties was a prerequisite for maintaining security was to put oneself on the same moral

[84] UN Security Council Resolution 1456 (2003), para. 6.
[85] UN General Assembly Resolution 60/288 (2006), "The United Nations Global Counter-Terrorism Strategy.' The Strategy, which built on the consensus achieved by world leaders at their 2005 September, marked the first time that all Member States of the United Nations agreed to a common strategic and operational framework to fight terrorism. It contained the basis for a concrete plan of action: to address the conditions conducive to the spread of terrorism; to prevent and combat terrorism; to take measures to build state capacity to fight terrorism; to strengthen the role of the United Nations in combating terrorism; and to ensure the respect of human rights while countering terrorism.
[86] See, e.g., Richard A. Posner, "Security versus Civil Liberties," *The Atlantic Monthly* 288, no. 5 (2001) 46-7; Viet D. Dinh, "Freedom and Security after September 11," *Harvard Journal of Law and Public Policy* 25, no. 2 (2002): 399-406.
[87] Eric A. Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (Oxford: Oxford University Press, 2007).
[88] See, e.g., Cole and Dempsey, *Terrorism and the Constitution.* See also Brown, *Lost Liberties.*
[89] See, e.g., Ronald Dworkin, "Terror and the Attack on Civil Liberties," *New York Review of Books* 50, no. 17 (6 November 2003).

plane as the terrorists for whom the end justified the means. When the end justifies the means, however, the "difference between terror and those fighting it, becomes increasingly indistinct."[90] Indeed, sacrificing fundamental liberal values such as the respect for the rule of law, civil liberties and human rights would amount to losing the "war on terrorism without firing a single shot."[91]

What both sides have in common is that they then turn to history to seek vindication for their claims. In the United States, commentators who supported draconian domestic measures against terrorism often referred to President Lincoln's suspension of *habeas corpus* during the Civil War and argue that democracies have survived precisely for the reason that they have occasionally suspended traditional rights and guarantees.[92] The constitutional Bill of Rights, after all, did not constitute a "suicide pact".[93] The opponents of repressive measures, on the other hand, point to the arbitrary and unjust internment of Japanese Americans during World War II and instead preferably quote Benjamin Franklin who reminded his fellow colonists in 1759 that "they that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."[94]

In Europe, both sides turn to the responses to left-wing and separatist terrorism in the 1970s and 80s, for instance, to seek guidance for the evaluation of current counter-terrorism measures. Some argue that the temporary suspension of civil liberties and human rights in previous terrorism emergencies actually strengthened liberal democracy and that it also contributed significantly to reducing terrorism.[95] Others maintain that the repressive counter-measures taken often led to an escalation of the conflict and, what is more, that they continue to have adverse effects on civil liberties and human rights up to this day.[96] In Australia, too, commentators have referred to

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[90] Emanuel Gross, "Legal Aspects of Tackling Terrorism: The Balance Between the Right of a Democracy to Defend Itself and the Protection of Human Rights" *UCLA Journal of International Law & Foreign Affairs* 6, no. 1 (2001): 167-68.

[91] See, e.g., the statement by Wisconsin democrat Russell Feingold, the only US senator to vote against the USA Patriot Act, who has pointed out that "[p]reserving our freedom is one of the main reasons we are now engaged in this new war on terrorism. We will lose that war without firing a shot if we sacrifice the liberties of the American people." Senator Russell Feingold (D–WI), Statement on the Anti-Terrorism Bill, U.S. Senate, 25 October 2001, <http://feingold.senate.gov/~feingold/statements/01/10/102501at.html>; see also UN Secretary-General Kofi Annan, Statement to Conference "Fighting Terrorism for Humanity: A Conference on the Roots of Evil," 22 September 2003.

[92] See, e.g., William H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime* (New York: Alfred A. Knopf, 1998).

[93] See, e.g., Jonathan Alter, "Time to Think about Torture," *Newsweek* 138, no. 19 (5 November 2001): 45, quoting U.S. Supreme Court Justice Robert Jackson in *Terminiello v. City of Chicago* (1949): "There is the danger that, if the court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact." 337 U.S. 1, 13 (1949) (Jackson, J., dissenting).

[94] See, e.g., Jerel A. Rosati, "At Odds with One Another: The Tension between Civil Liberties and National Security in Twentieth-Century America," in David B. Cohen and John W. Wells (eds.), *American National Security and Civil Liberties in an Era of Terrorism* (2004) 9-28. The quote from Benjamin Franklin can be found in Emily Morrison Beck (ed), *Bartlett's Familiar Quotations: A Collection of Passages, Phrases, and Proverbs Traced to their Sources in Ancient and Modern Literature* (Boston, MA: Little, Brown & Company, 15th and 125th anniversary edn. 1980) 348.

[95] See, e.g., Hans Josef Horchem, "The Lost Revolution of West Germany's Terrorists," *Terrorism and Political Violence* 1, no. 3 (1989): 353-60.

[96] See, e.g., Heribert Prantl, *Verdächtig: Der starke Staat und die Politik der inneren Unsicherheit* (Hamburg: Europa, 2002) 24-51; Oliver Tolmein, *Vom Deutschen Herbst zum 11. September* (Hamburg: Konkret, 2002) 10-105.

historical examples where governments sought to curb civil liberties and fundamental freedoms in the name of national security. Particular reference is made to the attempt by government of Prime Minister Robert Menzies to outlaw the Australian Communist Party in the 1950s.[97]

What is most striking, however, is the fact that the great majority of commentators on both sides of the equation argue that in order to protect liberal democracy from the scourge of international terrorism a "balance" must be struck between security and liberty.[98] Where this balance falls, of course, depends on the political colours of the respective commentator. In Australia, the balance metaphor is routinely employed by scholars[99] and policymakers alike.[100] In various parliamentary debates both the Government and the Opposition invoked the balancing paradigm to justify or criticise proposed anti-terrorism legislation. Defending the first package of anti-terrorism laws in the Senate in June 2002, the then Minister for Justice and Customs, Chris Ellison, for instance, argued that the proposed legislation "strikes a balance between those security needs and the rights

[97] See, e.g., George Williams, "Australian Values and the War against Terrorism," *University of New South Wales Law Journal* 26, no. 3 (2003): 191-99; Jenny Hocking, "Counter-Terrorism and the Criminalisation of Politics: Australia's New Security Powers of Detention, Proscription and Control," *Australian Journal of Politics and History* 49, no. 3 (2003) 355-71; Jenny Hocking, *Terror Laws: ASIO, Counter-terrorism and the Threat to Democracy* (Sydney: University of New South Wales Press, 2004).

[98] For media commentary using the "balance" metaphor , see e.g. Jeffrey Rosen, "The Difficult Balance Between Liberty and Security," *New York Times* (New York), 6 October 2002; Paul Rosenzweig, "Balancing Liberty and Security," <http://www.heritage.org/press/commentary/ed051403a.cfm>, 14 May 2003; Stuart Taylor, Jr., "Rights, Liberties, and Security: Recalibrating the Balance after September 11," <http://www.brookings.edu/articles/2003/winter_terrorism_taylor.aspx>, Winter 2003. For academic commentary see, e.g., Eric A. Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (Oxford: Oxford University Press, 2007); Paul J.A. De Hert, "Balancing Security and Liberty within the European Human Rights Framework: A Critical Reading of the Court's Case Law in the Light of Surveillance and Criminal Law Enforcement Strategies after 9/11," *Utrecht Law Review* 1, no. 1 (2005): 68-96; Gregory F. Treverton, "Balancing Security and Liberty in the War on Terror," <http://www.maxwell.syr.edu/campbell/events/past/papers/ISHS/Treverton.pdf>; David Cole, "The Poverty of Posner's Pragmatism: Balancing Away Liberty After 9/11," *Stanford Law Review* 59, no. 6 (2007): 1735-54; Angela Liberatore, "Balancing Security and Democracy, and the Role of Expertise: Biometrics Politics in the European Union," *European Journal on Criminal Policy and Research* 13, no. 1-2 (April 2007): 109-37; Laurence Lustgarten, "National Security, Terrorism, and Constitutional Balance," in Georg Meggle (ed.), *Ethics of Terrorism & Counter-terrorism* (Frankfurt: Ontos Verlag, 2005), 261-80; James J. Lopach and Jean A. Luckowski, "National Security and Civil Liberty: Striking the Balance," *Social Studies* 97, no. 6 (November-December 2006): 245-48; Howard Ball, *The USA Patriot Act of 2001: Balancing Civil Liberties and National Security: A Reference Handbook* (Santa Barbara, CA: ABC-CLIO, 2004); Dick Thornburgh, "Balancing Civil Liberties and Homeland Security: Does the USA Patriot Act Avoid Justice Robert H. Jackson's Suicide Pact?" *Albany Law Review* 68 (2005): 801-13; Jan C. Ting, "The Need to Balance Liberty and Security," in Alexander Moens and Martin Collacott (eds.), *Immigration Policy and the Terrorist Threat in Canada and the United States* (Vancouver, B.C.: Fraser Institute, 2008) 113-28; A.T.H. Smith, "Balancing Liberty and Security? A Legal Analysis of United Kingdom Anti-Terrorist Legislation," *European Journal on Criminal Policy and Research* 13, no. 1-2 (April 2007): 73-83.

[99] Ben Golder and George Williams, "Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism," *Journal of Comparative Policy Analysis* 8, no. 1 (2006) 43-62; Andrew Lynch, "Exceptionalism, Politics and Liberty: A Response to Professor Tushnet from the Antipodes," *International Journal of Law in Context* 3, no. 4 (2008): 305-12. For criticism of the balancing approach, see, e.g., Simon Bronitt, "Balancing Security and Liberty: Critical Perspectives on Terrorism Law Reform," in Pene Mathew and Miriam Gani (eds.), *Fresh Perspectives on the "War on Terror"* (Canberra: Australian National University e-Press) 65-83; Simon Bronitt, "Constitutional Rhetoric v Criminal Justice Realities: Unbalanced Responses to Terrorism?' *Public Law Review* 14, no. 1 (2003): 76-80; Miriam Gani, "Upping the Ante in the "War on Terror"' in Patty Fawkner (ed), *A Fair Go in an Age of Terror* (Kew East: David Lovell Publishing, 2004) 80-91.

[100] Prime Minister John Howard quoted in "PM announces tough anti-terror measures," *Sydney Morning Herald* (Sydney), 8 September 2005; see also Human Rights and Equal Opportunity Commission, *Submission to the Parliamentary Joint Committee on ASIO, ASIS and DSD* (23 May 2003) para 22; <http://www.hreoc.gov.au/human_rights/terrorism_sub/asio_asis_dsd.html>.

and liberties of all Australians."[101] Similarly, in March 2006, the then Attorney-General, Philip Ruddock, declared that "the measures contained in the [ASIO Amendment] bill maintain an appropriate balance with civil liberties."[102] The opposition employed the balance metaphor as well. Responding to Senator Ellison in June 2002, Labor Senator John Faulkner pointed out that "the challenge remains for this parliament to get the balance right."[103] Likewise, in a historical December 2002 debate on new detention and questioning powers for Australia's domestic intelligence agency, the then Leader of the Opposition, Simon Crean, claimed that "the [ASIO] bill that is before us, the bill that we say the government should accept, gets the balance right between protecting our security and protecting our citizens."[104]

III. "Balancing" Liberty with Security?[105]

While the language of balance has featured prominently in the post-9/11 public and academic debate on security and human rights and civil liberties, its usage is by no means new. Scholars have previously employed the metaphor in the discourse on countering terrorism in the democratic context.[106] Nevertheless, it is submitted here that rhetoric of balance is unsuitable for reconciling respect for civil liberties and human rights with the (alleged) imperatives of national security. The purpose of this section is thus to examine the logic behind the balance metaphor in more detail and to demonstrate that the language of balance is problematic for a number of reasons. These can broadly be categorised into philosophical, rights-based, strategic and practical objections.

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[101] Commonwealth of Australia, *Parliamentary Debates*, *Senate*, 24 June 2002, 2446 (Chris Ellison).
[102] Commonwealth of Australia, *Parliamentary Debates*, *House of Representatives*, 29 March 2006, 7 (Philip Ruddock).
[103] Commonwealth of Australia, *Parliamentary Debates*, *Senate*, 26 June 2002, 2624 (John Faulkner).
[104] Commonwealth of Australia, *Parliamentary Debates*, *House of Representatives*, 12 December 2002, 10431 (Simon Crean). Crean also noted that "We have supported tough new powers to fight terrorism, but we also want protection for our citizens. It means getting the balance right. I use the words 'getting the balance right' because when the previous antiterrorism bills came before this House the government and the Prime Minister argued that our amendments were unworkable and unacceptable. We hear that language again tonight. Three months later, when the Prime Minister went before the National Press Club, he said that the antiterrorism bill had got the balance right." Ibid, 10430.
[105] An earlier draft of this section was published as Christopher Michaelsen, "Balancing Liberty against Security? A Critique of Counterterrorism Rhetoric," *University of New South Wales Law Journal* 29, no. 2 (2006): 1-21.
[106] See, e.g., David A. Charters, "Conclusions: Security and Liberty in Balance – Countering Terrorism in the Democratic Context," in David A. Charters, *The Deadly Sin of Terrorism: Its Effect on Democracy and Civil Liberty in Six Countries*, 211-46; Peter Chalk, "The Response to Terrorism as a Threat to Liberal Democracy", *Australian Journal of Politics & History* 44 (1998): 88; In the 1980s Grant Wardlaw, for instance, has argued that "the duty of the government is to balance the extent of the response with the seriousness of the problem and the rights of its citizens", see Grant Wardlaw, *Political Terrorism*, 126.

1. Philosophical Objections

a) The Interrelationship between Liberty and Security

The image of balancing liberty and security in the discourse on countering terrorism is misleading for philosophical and conceptual reasons. It is based on the false assumption that the two goods are mutually exclusive. Liberty and security, however, are interrelated and mutually reinforcing and thus cannot be "balanced" against each other logically. In order to illustrate the reciprocal relationship between liberty and security it is helpful to re-visit briefly some key underpinnings of liberalism which, after all, provides the philosophical foundations of modern democracies.

At the outset of his *Two Treatises of Government*, John Locke, for instance, describes the state of nature as a state of liberty and equality between individuals. In this state of nature, individuals have two natural rights: the right to preserve themselves and the right to punish others for attempting to kill them or generally threatening their survival.[107] They exercise those rights under the constraint of the law of nature, whereby they are forbidden to harm others. As Locke puts it, "though this be a state of liberty, yet it is not a state of license."[108] Although the state of nature is not by definition a Hobbesian state of war, it is also not stable enough for people to be altogether happy in it.[109] Indeed, the state of liberty is likely to degenerate into a state of war for not everybody is disposed to fulfil their duties. Hence an impartial judge is needed to interpret the law and to mediate. Furthermore, a government is needed to enforce the law and provide stability and security.[110] Locke specifically described the reasons men have for abandoning the state of nature in favour of political society as "the mutual preservation of their lives, liberties, and estates, which I call by the general name 'property'."[111]

The realisation of the classic notion of liberty was further advanced and refined by several constitutions of leading liberal democracies.[112] It features prominently in the US constitution which has subsequently influenced constitutional developments around the world. The German constitution of 1949, the Basic Law, is a prime example in this regard. It regards individual liberty as a prerequisite for the constitutional order and declares (autonomous) human beings to be the

[107] John Locke, *The Second Treatise of Government*, Thomas P. Peardon, ed., (New York: Macmillan, 1952), Chapters 2–3, especially paras 4, 16, 18.
[108] Ibid.
[109] To Thomas Hobbes the state of nature in which man lived before the social contract was "a war of every Man against every Man, a condition of internecine strife in which the life of man was solitary, poor, nasty, brutish and short." Thomas Hobbes, *Leviathan*, edited by Richard Tuck (Cambridge: Cambridge University Press, 1991) Chapter 13.
[110] Locke, *The Second Treatise of Government*, Chapter 9, paras 124-6.
[111] Ibid, para 123.
[112] E.g. by the constitutions of Germany (1949), Austria (1945), France (1958), Italy (1947), Denmark (1953), Spain (1978) and Estonia (1992).

legitimating subjects of the constitution.[113] The constitutional protection of liberty not only aims at the protection of the individual, but also constitutes a command of the democratic constitutional order which needs free individuals to form the democratic community. It supports individual development and enhances democratic participation which leads to the existence of a plural and open society. Nevertheless, the German constitution does not solely protect the autonomy of the individual out of respect for human individuality. Individual freedom constitutes a prerequisite for a democratic polity. What is more, it is a precondition for serving as a constitutional source of legitimation.[114]

As this very brief historical review reveals, liberty is a precondition of security. At the same time, a certain degree of security and personal safety is indispensable for the realisation of personal freedom. In the political discourse on counter-terrorism and civil liberties, however, the interrelationship between liberty and security is often portrayed one-sidedly. Government ministers and other commentators overemphasise the aspect of personal safety and national security as a precondition of liberty and tend to ignore the fact that individual freedom legitimises the existence of the State in the first place. In light of the threat of terrorism, so the argument runs, the citizen's full enjoyment of civil liberties requires a "secure environment" in which human rights and fundamental freedoms can be realised. This state of security is to be achieved through the expansion of the investigative powers of government and through other intrusive features of special anti-terrorism legislation.

Defending the new anti-terrorism laws in Australia, the former Attorney-General, Philip Ruddock, has also invoked the concept of human security in the context of counter-terrorism law and policy. According to Ruddock, the "human security"–approach constituted a "new framework" for understanding counter-terrorism and the rule of law since it allows striving towards the twin goals of security and justice.[115] In light of a "new climate of terrorism", Ruddock argued, "we must recognise that national security can in fact promote civil liberties by preserving a society in which

[113] Articles 1 and 2 of the Basic Law (1949), see generally Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, NC: Duke University Press, 1989).
[114] The centrality of the individual human being as the source of the entire legal system, as well as its addressee, is expressed in the first article of the German constitution, the Basic Law, which reads: "Human dignity is inviolable. To respect and protect it is the duty of all State authority."
[115] Philip Ruddock, "A New Framework: Counter Terrorism and the Rule of Law," Address to the Sydney Institute, Sydney, 20 April 2004,
<http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Speeches_2004_Speeches_20_April_2004_-_Speech_-_A_New_Framework:_Counter_Terrorism_and_the_Rule_of_Law>.

rights and freedoms can be exercised."[116] As a consequence, "the extent to which we can continue to enjoy our civil liberties rests upon the effectiveness of our anti-terrorism laws."[117]

It is beyond question that it is indeed one of the responsibilities of liberal democratic government to protect the citizenry from threats to safety and physical integrity. The duty to protect, however, is but one of several interrelated and indivisible obligations of government. These include most importantly the fundamental obligation to respect human rights and the rule of law.[118] A policy that does not respect human rights and the rule of law in the first place cannot legitimately claim to protect these rights against transnational security threats in times of emergency.

It is thus also misleading to suggest that it is only *after* the government has created a "secure environment" that citizens can enjoy civil liberties and human rights. This argument may find some practical application in failed states, countries experiencing civil war or in other situations where there is a wide-spread lack of law and order. It is rather unconvincing in the context of liberal democracies like Australia, the United States or member states of the European Union.

The argument, however, is also problematic for theoretical reasons. Asserting that the establishment of a "secure environment" is a precondition for the enjoyment of human rights and civil liberties would ultimately lead to security demands the government is not able to fulfil. Besides, it would effectively result in the contention that it is the State that "creates" human rights and civil liberties in the pursuit of security and societal freedom. Such reasoning, however, is entirely inconsistent with the very idea of modern liberal democracy. As Burkhard Hirsch, a former German Minister of Justice, has pointed out, "there is no societal freedom without the freedom of the individual."[119] Indeed, an approach that effectively attributes the creation of human rights and civil liberties to the State would eventually bring about the end of personal and political freedom. The respect for and

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[116] Philip Ruddock, "International and Public Law Challenges for the Attorney-General," Address to the Law Faculty, Australian National University, Canberra, 8 June 2004, paragraphs 81-84, available at <http://law.anu.edu.au/cipl/Lectures&Seminars/04%20Ruddockspeech%208June.pdf>.

[117] Ibid.

[118] The interwoven structure of state obligations has been further refined by developments in international human rights law. The UN human rights treaty bodies, the Special Procedures of the UN Commission on Human Rights and other institutions have adopted a three-level typology outlining the obligations of states. This typology is now widely accepted and determines the state's duties as "obligations to respect, protect and fulfil" individual rights. It is applicable to civil and political rights as well as economic, social and cultural rights. The obligation to respect requires states to refrain from interfering with the enjoyment of human rights. The obligation to protect human rights entails the expanding responsibility of States to regulate the behaviour of third parties with respect to precluding the possibility that private persons, acting within the private domain, can violate these rights (so-called "horizontal effectiveness" of human rights). Finally, the obligation to fulfil requires states to take action to achieve the full realization of rights. These actions can include enacting laws, implementing budgetary and economic measures, or enhancing the functioning of judicial bodies and administrative agencies. See, e.g., Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht 1997, <http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html>.

[119] Burkhard Hirsch, "Der attackierte Rechtsstaat: Bürgerrechte und 'innere Sicherheit' nach dem 11. September," *Vorgänge – Zeitschrift für Bürgerrechte und Gesellschaftspolitik* 159 (2002):14 [translated by the author].

protection of human rights would then be reduced to a mere variable in the government's security policy. Human rights and civil liberties would represent "luxury goods" for enjoyment in times of peace but would not constitute meaningful checks for government in times of perceived national danger. As noted earlier, this reasoning is employed by commentators attempting to justify curtailments of civil liberties and human rights for the sake of counter-terrorism.

This reasoning very much resembles the political authoritarianism formulated by the German political and legal theorist Carl Schmitt during the political turmoil of the Weimar Republic. Schmitt claimed that the "existence of the State is undoubted proof of its superiority over the validity of the legal norm."[120] Because the norms of a legal system cannot govern a state of emergency, they cannot determine when such an exceptional state holds, or what should be done to resolve it. As a consequence, every legal order ultimately rests not upon norms, but rather on the decisions of the sovereign. The essence of sovereignty lies in the absolute authority to decide when the normal conditions presupposed by the legal authority exist.[121] For Schmitt, the respect and protection of human rights and civil liberties were thus subsidiary to the security considerations of the government (as sovereign). It is well known that several aspects of this political theory led to a defence of authoritarian dictatorship and initially to Schmitt's own personal support of National Socialism and the Third Reich.[122] Schmitt's work has also received renewed attention in the post 9/11 era with some scholars linking his thinking to policy approaches by the Bush administration.[123]

In light of the parallels between Schmitt's political philosophy and some recent approaches to counterterrorism policy it is all the more surprising that commentators like Philip Ruddock invoked the concept of human security to justify intrusive anti-terrorism legislation. Often referred to as "people-centred security" or "security with a human face," the idea of human security places human beings - rather than states - at the focal point of security considerations. While the concept's definition and scope have been debated heatedly in recent years, most scholars seem to agree that human security involves more than the absence of violent conflict.[124] As the former UN Secretary-

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[120] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, translated by George Schwab (Cambridge, MA: MIT Press, 1985) 12.

[121] "Sovereign is he who decides on the exception." Ibid, 5.

[122] See, e.g., John P. McCormick, "Carl Schmitt, Leo Strauss, and the Revival of Hobbes in Weimar and National Socialist Germany," *Political Theory* 22, no. 4 (1994): 619-52.

[123] See, e.g., Jonathan Simon, "Parrhesiastic Accountability: Investigatory Commissions and Executive Power in an Age of Terror," *Yale Law Journal* 114, no. 6 (2004): 1419-45; Erin Runions, "Theologico-Political Resonance: Carl Schmitt between the Neocons and the Theonomists," *Journal of Feminist Cultural Studies* 18, no. 5 (2007): 43-80; Alan Wolfe, "A Fascist Philosopher Helps Us Understand Contemporary Politics," *The Chronicle of Higher Education*, 2 April 2004, <http://www.stanford.edu/~weiler/Wolfe_on_Schmitt_044.pdf>; Damon Linker, "Carl Schmitt And The American Right," *The New Republic*, 3 March 2009.

[124] The Harvard University's Program on Humanitarian Policy and Conflict Research has compiled and compared definitions of the concept of human security from a variety of people and sources, ranging from the United Nations

General Kofi Annan has noted, "it encompasses human rights, good governance, access to education and health care and ensuring that each individual has opportunities and choices to fulfil his or her own potential."[125] When Ruddock focused on the more traditional notions of security in his invocation of the concept in the sense of providing protection from physical harm, he ignored other, equally central aspects of human security which seek to ensure that every individual has the same legal rights and is not at risk of arbitrary or oppressive state action. As Miriam Gani has pointed out, to highlight one feature of human security at the expense of others is rather improper and misleading.[126]

b) The Dual Effect of Increasing the Powers of the State

A further conceptual argument against the assertion that liberty needs to be balanced against security is that enhancing the powers of the State effectively has dual consequences. While diminishing liberty may enhance security against terrorism, it also reduces security against the State.[127] Security against the State is reduced by dismantling traditional checks and balances like due process guarantees and other essential freedoms such as the right to liberty and security of person.

Commentators arguing that enhancing the powers of the State for the purposes of combating terrorism naturally leads to increased public security appear to misunderstand the very idea of security. As has been outlined above, the concept of human security, for instance, does not only encompass the protection against physical harm but also seeks to ensure that individuals are not at risk of oppressive state action. Accordingly, a system of civil liberties and human rights does not just represent an array of individual benefits but has aspects of a public good itself. In fact, some scholars have argued that the rule of law and the respect for civil liberties and human rights constitute major components of national security.[128]

A similar approach is taken by various international conventions such as the International Covenant on Civil and Political Rights and the European Convention on Human Rights. These instruments

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Secretary-General Kofi Annan to the Canadian and Japanese governments and a number of academics of various disciplines; see <http://www.hsph.harvard.edu/hpcr/events/hsworkshop/reference_resources.html>.

[125] Kofi Annan, "Secretary-General Salutes International Workshop on Human Security in Mongolia," *Press Release* SG/SM/7382, (8 May 2000).

[126] Gani, "Upping the Ante in the 'War on Terror," 97-101.

[127] See also Ronald Dworkin, "The Threat of Patriotism," *New York Review of Books* 49, no. 3 (February 2002): 44-49. <http://www.nybooks.com/articles/15145>.

[128] See, e.g., Emanuel Gross, 'Legal Aspects of Tackling Terrorism: The Balance Between the Right of a Democracy to Defend Itself and the Protection of Human Rights', *UCLA Journal of International Law & Foreign Affairs* 6, no. 1 (2001):167-88.

explicitly protect the right to liberty and security of person. Security is understood as providing protection and safeguards against impairment of personal rights by the State. These safeguards include the principle of legality and the prohibition of arbitrariness. This means that it is not enough for deprivation of liberty to be provided by law. The law itself must not be arbitrary, and the enforcement of the law in a given case must not take place arbitrarily.[129] As Manfred Nowak has noted, the term "arbitrary" contains the elements of injustice, unpredictability, unreasonableness, capriciousness and unproportionality, as well as the Anglo-American principle of due process of law.[130] Increasing the powers of the State for counter-terrorism proposes, however, usually results precisely in the diminishment of due process guarantees such as the right to a fair trial. It can thus be argued that this may actually have adverse effects on security by creating a threat that could turn out be greater than the threat of international terrorism itself. It is thus erroneous to suggest that security can be weighed up against liberty through a simple balancing exercise.

A related concern stems from the fact that domestic security may also diminish because the growth in state power resulting from new counterterrorist provisions is not evenly distributed within the State. As Laura Donohue has observed, the executive, freed from traditional checks and balances, assumes central importance and gains a significant amount of autonomy.[131] The citizenry, on the other hand, deprived of the special knowledge assumedly available to government, must trust the executive that the terrorist threat faced by the State is indeed of sufficient magnitude to justify the curtailment of individual liberty. It must also rely on the government's judgment as to whether the adopted counter-measures will actually address the threat level effectively. As a consequence, it is no longer the legislature or the population that decides where the alleged balance between security and liberty is to be struck, but the executive. To claim that it is specifically the liberty of individuals which is traded off for the security of the community and the State is thus overly simple as well as somewhat deceptive. What is also traded off for the allegedly enhanced security against terrorism are the checks and balances placed on the distribution of power within the State.[132]

c) Consequentialism in the Realm of Civil Liberties?

The idea of balancing liberty and security basically rests on the assumption that individual rights can and must be balanced against the interests of the greater community - or put in the context of

[129] Manfred Nowak, *Covenant on Civil and Political Rights: CCPR Commentary* (Kehl, N.P. Engel, 1993), 172.
[130] Ibid.
[131] See also Laura K. Donohue, "Security and Freedom on the Fulcrum," *Terrorism and Political Violence* 17, no. 1-2 (2005): 80-81.
[132] Ibid.

counter-terrorism, that the civil liberties and human rights of individuals must be sacrificed in order to gain greater security for the majority.[133] This utilitarian calculus finds its philosophical roots in the doctrine of consequentialism. As its name suggests, consequentialism is based on the view that normative properties depend only on consequences. The paradigmatic form of consequentialism is utilitarianism, whose classic proponents were Jeremy Bentham and John Stuart Mill.[134] According to Bentham, for example, an act is morally right only if it causes "the greatest happiness for the greatest number."[135] It cannot be the purpose of this chapter to examine in greater detail the philosophy of consequentialism in all its aspects and criticisms.[136] Suffice it to say that consequentialist talk of changes in the balance as circumstances and consequences change may not be appropriate in the realm of civil liberties.[137] Civil liberties are associated with rights. And, as leading political and legal philosophers of the 20th and 21st century have pointed out, rights discourse is often resolutely anti-consequentialist. Being superior to mere individual and societal interests, rights are generally not vulnerable to routine changes in the calculus of social utility.

Two of the most powerful arguments in this regard have been made by the late Harvard philosopher John Rawls and by the legal theorist Ronald Dworkin respectively. In *A Theory of Justice* John Rawls develops a contractarian view where the principles of justice are themselves the object of a kind of social contract.[138] He argues that a just society would be based on two such principles. The first principle of justice states that all individuals have an equal right to liberty. Once this condition is satisfied, the second principle is considered. This second principle states that social and economic inequalities shall be arranged to the greatest benefit of the least advantaged of society. The hierarchy of the two principles in this order is justified by two rules of priority. The first priority rule, the priority of liberty, states that the principles of justice must be ranked in "lexical order".[139] As a consequence, liberty can only be restricted for liberty's sake in situations where the limitations would strengthen the total system of liberty shared by all, or when unequal liberty is acceptable to

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[133] Whether or not the interests of the individual are balanceable against the interest of the community at all is a highly problematical question that cannot be discussed here. Suffice it to note that this proposition has been challenged by several eminent scholars. Ronald Dworkin, for instance, has argued that "the interests of each individual are already balanced into the interests of the community as a whole, and the idea of a further balance, between their separate interests and the results of the first balance, is itself therefore mysterious." Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977) 73.

[134] See, e.g., John Stuart Mill, *Utilitarianism, Liberty, and Representative Government*, introd. by A.D. Lindsay (London: JM Dent, 1964).

[135] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford: Clarendon Press, 1961, originally published in 1789).

[136] For in-depth analysis see, e.g., Samuel Scheffler (ed.), *Consequentialism and Its Critics* (Oxford: Oxford University Press, 1988); Samuel Scheffler, *The Rejection of Consequentialism: A Philosophical Investigation of the Considerations Underlying Rival Moral Conceptions* (Oxford: Clarendon Press, 1994).

[137] See also Jeremy Waldron, "Security and Liberty: The Image of Balance," *Journal of Political Philosophy* 11, no. 2 (2003): 194.

[138] John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1999).

[139] Ibid, 36-40.

those with the lesser liberty.[140] The second priority rule, "justice over efficiency and welfare," is concerned with the maximizing of advantages and opportunities. The inequality of opportunities is acceptable when it enhances the opportunities of those with the lesser opportunities, and the excessive rate of saving by those with the most advantage must on balance mitigate the burden of those bearing the hardship. In other words, justice is achieved when unequal opportunities are weighted towards the least fortunate and the accumulation of wealth is just when it helps to alleviate the burdens of the less fortunate. In contrast to consequentialists and utilitarians, Rawls thus does not allow some people to suffer for the greater benefit of others.

Ronald Dworkin has taken a similar approach. In *Taking Rights Seriously* he argues that rights claims must generally take priority over alternative considerations when formulating public policy and distributing public benefits.[141] Rights are best understood as so-called 'trumps' over some background justification for political decisions that formulates a goal for the community as a whole. As Dworkin puts it:

> The existence of rights against the Government would be jeopardized if the Government were able to defeat such a right by appealing to the right of a democratic majority to work its will. A right against the Government must be a right to do something even when the majority thinks it would be wrong to do it, and when the majority would be worse off for having it done. If we now say that society has a right to do whatever is in the general benefit, or the right to preserve whatever sort of environment the majority wishes to live in, and we mean that these are the sort of rights that provide justification for overruling any rights against the Government that may conflict, then we have annihilated the later rights.[142]

According to Dworkin the notion of rights as 'trumps' expresses the fundamental ideal of equality upon which the contemporary doctrine of human rights rests. Treating rights as "trumps" is a means of ensuring that all individuals are treated in an equal and like fashion in respect of the provision of fundamental human rights. Fully realising the aspirations of human rights may not require the provision of "state of the art" resources, but this should not detract from the force of human rights as taking priority over alternative social and political considerations.[143]

The application of Rawls' reasoning to the current talk of balance may lead to the conclusion that a trade-off between liberty and security is simply ruled out. Security would fall into the domain of the (second) principle governing social and economic goods and, due to lexical inferiority, could not be

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[140] Ibid, 214-20.
[141] Dworkin, *Taking Rights Seriously*, 189-94.
[142] Ibid, 194.
[143] Ronald Dworkin, "Rights as Trumps," in Jeremy Waldron (ed.), *Theories of Rights* (Oxford: Oxford University Press, 1984) 153-67.

"balanced" against the superior principle of liberty. Similarly, considering Dworkin's argument that rights "trump" societal interests, civil liberties would be practically impervious to social utility arguments. The security of the whole community would constitute a public interest which generally would not be "balanceable" with rights since the latter stand on superior moral and legal planes.

The argument presented here rests on the assumption, of course, that civil liberties are qualitatively equal to rights. One may well argue, however, that anti-consequentialist concepts of liberty and rights as formulated by Rawls and Dworkin cannot be applied to civil liberties straightforwardly. It is not the purpose of this chapter to get very much further into the discussion of this problem. The aim of the brief discourse on consequentialism was merely to indicate that a simple balancing exercise may neglect significant aspects of the jurisprudential underpinnings of both liberty and security.

2. Rights-based Objections

a) Security as Individual Right or "State Purpose"?

It has been argued that rights appear practically impervious to social utility arguments. However, even non-utilitarians acknowledge that rights can hardly be absolute in all the circumstances. As Dworkin has pointed out, "someone who claims that citizens have a right against the Government need not go so far as to say that the State is *never* justified in overriding that right."[144] He suggests that the State may override a given right when it is necessary to protect the rights of others. Accordingly, for security to be "balanceable" with human rights and civil liberties, it would have to be construed as an individual right, whose protection could at times necessitate reconciliation with liberty rights. The question that thus needs to be asked is: can security constitute an individual right?

The idea of a human right to security has been debated for some time.[145] Nonetheless, it has received particular attention in the context of anti-terrorism legislation introduced in the aftermath of the 9/11 attacks. Defending Germany's legislative changes, the then Interior Minister, Otto Schily, for instance, claimed that curtailments of liberty were warranted by the government's

[144] Dworkin, *Taking Rights Seriously*, 194.
[145] See, e.g., Josef Isensee, *Das Grundrecht auf Sicherheit* (Berlin/New York: Walter de Gruyter, 1983); Christoph Gusy, "Rechtsgüterschutz als Staatsaufgabe - Verfassungsfragen der Staatsaufgabe Sicherheit," *Die Öffentliche Verwaltung* 49 (1996): 573-83; Jutta Limbach, "Ist die kollektive Sicherheit der Feind der individuellen Freiheit?" *Die Zeit* (Hamburg), 10 May 2002.

obligation to protect the "basic right to security" of German citizens.[146] Despite the fact that the basic rights catalogue of the German constitution does not contain any specific right to security, Schily assumed that this right was an "implicit component" of the Basic Law. Schily's then Australian counter-part, Philip Ruddock, also invoked the right to security as a basis for introducing wide-ranging anti-terrorism laws.[147] For the former Attorney-General, the existence of this right was hardly questionable since it was also protected by Article 3 of the Universal Declaration of Human Rights (UDHR) and Article 9 of the International Covenant on Civil and Political Rights (ICCPR).[148] Commentators have also sought to construe an individual right to security by referring to the State's obligation to protect the citizenry. In reverse, so the argument runs, the State's duty to protect creates a positive individual right to security.[149]

Both explanations, however, are unsatisfactory and unconvincing for factual as well as systematic reasons. The UDHR as well as the ICCPR and its corresponding regional instruments indeed protect the right to liberty and security of the person.[150] It is widely accepted, however, that this right does not relate to some broader right to safety or to any obligation for the State to protect with positive measures the physical integrity of its citizens.[151] On the contrary, the right to liberty and security of the person restricts the power of the State to coerce individuals through arbitrary arrest and detention. As Monica Macovei has noted, the European Convention on Human Rights formulation "liberty and security of the person" has to be read as a whole. "Security of a person" must be understood in the context of physical liberty.[152] It cannot be interpreted as referring to different matters (such as a duty on the State to give someone personal protection from an attack by others, or right to social security).[153] This interpretation has also been confirmed by the jurisprudence of the European Court of Human Rights.[154]

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[146] Heribert Prantl and Hans Werner Kilz, "Otto Schily ist Otto Schily - das ist gar nicht so schlecht," *Süddeutsche Zeitung* (Munich), 29 October 2001. Incidentally, Schily was a former defence counsel for the Baader-Meinhof Group.

[147] Philip Ruddock, "A New Framework: Counter Terrorism and the Rule of Law," Address to the Sydney Institute, Sydney, 20 April 2004.

[148] Ibid.

[149] See, e.g., Günther Jakobs, "Bürgerstrafrecht und Feindstrafrecht," *Höchstrichterliche Rechtsprechung im Strafrecht* (2004): 88-95.

[150] Article 9(1) ICCPR states that "[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

[151] Nowak, *CCPR Commentary*, 161-63; see also Jochen A. Frowein and Wolfgang Peukert, *Europäische Menschenrechtskonvention: EMRK-Kommentar* (Kehl: N.P. Engel, 1985) 53-58 with further references.

[152] Monica Macovei, *A Guide to the Implementation of Article 5 of the European Convention on Human Rights*, Human Rights Handbooks, No. 5 (2002) 6.

[153] Manfred Nowak has similarly noted "that the Strasbourg institutions do not attribute any *independent significance* beyond personal liberty to the right to security in Article 5 of the European Convention on Human Rights." Nowak, *CCPR Commentary*, 162.

[154] *See e.g. Bozano v. France* (9990/82) [1986] ECHR 16 (18 December 1986); *Kurt v. Turkey* (24276/94) [1998] ECHR 44 (25 May 1998).

It is also unconvincing to claim that the State's duty to protect the citizenry automatically creates a positive individual right to security. Firstly, a review of several constitutions and bills of rights of leading liberal democracies reveals the absence of any specific right to security. Neither the United States constitution nor the German Basic Law, for example, contain any right addressing personal security and safety explicitly. Other constitutions like the ones of Austria (1945),[155] Cyprus (1960),[156] Estonia (1992),[157] Hungary (1949),[158] Latvia (1992),[159] Malta (1964),[160] Portugal (1970),[161] and Spain (1978)[162] recognise a right to security. However, as with the international human rights instruments, these constitutions refer to the right to security in the context of personal liberty and the freedom from arbitrary and oppressive State action. As a consequence, the right to security in these constitutions does establish a right to personal protection or to a positive duty for the State to protect the citizenry from physical harm.

The idea of an individual right to security is also problematic for systematic reasons. In a liberal democracy it is one of the primary purposes of the State to protect fundamental human rights like the right to life, the freedom of speech, the right to property, etc. It is the respect for and the protection of the rule of law and of human rights *in their entirety* which lead to maintaining national security. If, however, national security is principally a result of the State respecting, protecting and facilitating *all* human rights, it would not make sense, from a systematic point of view, to create a separate and exclusive legal title or good allowing for an individual claim to security.[163] Otherwise a situation is created in which security policy would become an end in itself rather than a means of facilitating the realisation of liberty. Security policy would then be independent of and competing with the State's duty to respect and protect human rights. It would become qualitatively equal to the State's obligation to protect human rights. This would ultimately lead to an unlimited relativism where security may always trump the competing interest of human rights protection. This, however, is incompatible with the very idea of liberal democracy. It is a defining characteristic of liberal democracy that security policy is normatively bound to the rule of law and to human rights and not an end in itself.

The idea of security constituting an individual right is all the more problematic in the context of the threat of international terrorism (see also the discussion in Chapter 4 below). In contrast to the quite

[155] Art. 1.
[156] Appendice D, Part II, Art. 11.
[157] Art. 20.
[158] Art. 55.
[159] Art. 94.
[160] Art. 32.
[161] Art. 27.
[162] Art. 17.
[163] See also Gerhard Robbers, *Sicherheit als Menschenrecht: Aspekte der Geschichte, Begründung und Wirkung einer Grundrechtsfunktion* (Baden-Baden: Nonos, 1987) 15.

precisely defined civil liberties, the public good of security is generally rather unspecific. Indeed, normatively speaking, security cannot be positively, but only negatively defined in the sense of defence against dangers.[164] As a consequence, the definition of these dangers, including their individual assignment, is essential. The definition of these dangers and their individual assignment might have been possible in previous terrorism crises. In the cases of left-wing terrorism in Europe in the 1970s and 80s as well in the case separatist terrorism in Spain and elsewhere, the threats arose from a limited number of individuals operating in a locally confined and restricted environment. As far as the threat of international terrorism is concerned, however, this is more difficult. If the dangers arising from terrorism cannot be *sufficiently* defined and/or individually assigned, then it is imperative to consider security as a "state purpose" rather than as an individual right of legal subjects.

If, however, security is to be understood primarily as a "state purpose" rather than as an individual right, then it no longer constitutes a weighable position. The language of "balancing" security against liberty is thus misleading. Security has become vague in its meaning: As an empowering objective it constitutes a "state purpose", as a legal term it describes, in its respective definition, a legal good. But, as Oliver Lepsius has pointed out, this double meaning has to be strictly separated.[165] The positive "state purpose" of guaranteeing security must not be confounded with the negative legally protected right of defence against danger or else the different levels get confused. This would either lead to security demands the State is not able to fulfil or indicate the failure of the legal system. Lepsius has thus argued that security constitutes an objective that stands above positive law.[166] It must not be used as argumentative tool on the level of positive law. Otherwise a situation is created, in which positive law can always be trumped by the hyper-positive idea.

b) Conflicting Rights and the Right to Life

It has been argued in this chapter that security does not constitute an individual right of legal subjects, and that it therefore cannot be "balanced" against individual civil liberties. A popular move by supporters of repressive anti-terrorism laws is then to invoke the right to life of the victims of terrorist violence. The right to life, so the argument runs, is the supreme human right which

[164] A similar definitional approach has been used by several scholars of political science. Arnold Wolfers, for instance, has characterised security as "the absence of threats to acquired values;" Arnold Wolfers, "'National Security' as an Ambiguous Symbol," *Political Science Quarterly* 67, no. 4 (1952): 481-502. Likewise, David Baldwin has defined it as "a low probability of damage to acquired values," David A. Baldwin, "The Concept of Security," *Review of International Studies* 23, no. 1 (1997): 5-26.
[165] Oliver Lepsius, "Freiheit, Sicherheit und Terror: Die Rechtslage in Deutschland," *Leviathan* 32, no. 1 (2004): 64-88.
[166] Ibid.

trumps all other human rights. At first such reasoning may appear plausible as well as compatible with the non-consequentialist idea that rights may be balanced against each other but not against social utility. After all, balancing the right to life against other rights would see rights on both sides of the equation. Nevertheless, upon closer examination this line of argument is problematic for several reasons.

First, it is important to realise that the sources of the particular rights violations are different. The right to life of the victims of a terrorist attack is infringed upon by terrorist action whereas violations of other civil liberties and human rights through the application of anti-terrorism legislation find their origin in government action. A government may only be *indirectly* responsible for the violation of the right to life of victims of a terrorist attack (e.g. through inaction). As a consequence, the question that needs to be asked is: is a government's inaction, that is, refraining from introducing legislation or measures that *might* prevent terrorists from infringing upon the right to life of their victims, qualitatively equal to its direct action of introducing repressive laws? It is only when government inaction is qualitatively equal to direct government action that one can justifiably invoke the right to life as a "balancing right".

Second, while the right to life is undoubtedly one of the most fundamental human rights, it is highly questionable whether it automatically trumps all other human rights. A concept that enjoys broad acceptance, however, is that of the indivisibility, interdependence and universality of all human rights.[167] This concept, officially recognised by the Universal Declaration on Human Rights, further refined by the UN Human Rights Conference in Vienna in 1993 and cited by many UN documents since, provides that human rights are based on respect for the dignity and worth of all human beings.[168] While the right to life encompasses the right to live itself, it also includes the notion that life ought to be enjoyed with dignity. And it is in this respect that the right to life is not as easily "detachable" from other important rights such as the right to liberty and security of person. The protection of the right to life thus cannot go so far as to constitute a supreme justification for the curtailment of all other rights. Otherwise a situation is created where other human rights would ultimately lose all effect since they always could be infringed upon in the name of protecting the right to life.

[167] See, e.g., Eva Brems, *Human Rights: Universality and Diversity* (Dordrecht: Martinus Nijhoff, 2001); Ernst-Ulrich Petersmann, "On 'Indivisibility' of Human Rights," *European Journal of International Law* 14, no. 2 (2003): 381-85.
[168] "Annan stresses universality and indivisibility of human rights," *Media Release*, UN News Service, 24 April 2003, <http://www.un.org/apps/news/story.asp?NewsID=6832&Cr=Commission&Cr1=rights>.

3. Strategic Objections – Problematic Long-term Consequences

The image of balancing civil liberties and human rights against security is also misleading for strategic reasons. It is in this context that it is crucial to examine the potential effects of counter-measures more closely. While it is conceivable that certain repressive anti-terrorism measures may actually achieve some short-term security gains, they may simultaneously increase the threat of terrorism and diminish security in the long run. The suggestion that a simple dichotomy exists between liberty and security is thus false. It is precisely because of the curtailment of liberty that the threat to security may ultimately increase rather than diminish. At the heart of the argument lies the question of what motivates terrorists to engage in violence.

Much of the terrorism literature focuses on the psychological and sociological aspects leading to individual engagement of terrorists.[169] While terrorist behaviour is perhaps always determined by a combination of innate factors, two themes appear to dominate the debate among scholars: the role of personal grievances and the lack of alternative routes of expression and bringing about change. Harvard scholar Jessica Stern has concluded, for instance, that both alienation and humiliation play major roles in an individual's decision to engage in terrorism or political violence.[170] Similarly, other scholars have observed that social pressures as well as personal and cultural humiliation constitute major grounds for the emergence of terrorism.[171]

This has also been confirmed by Abdul Aziz Rantisi, the late political leader of Hamas. Addressing the motivation of Palestinian suicide bombers, Rantisi stated that 'to die in this way is better than to die daily in frustration and humiliation'.[172] Likewise, hopelessly entrenched political impasses and a "blocked society" have been blamed for the rise of Islamic extremism in Egypt, Saudi Arabia and Algeria.[173] During the 1990s, Islamic radicals in these countries grew increasingly frustrated by their failure to change the status quo at home. As a consequence they began turning their attention abroad. It was (and possibly is) felt among Islamist extremists that striking at the Arab regimes' Western sponsors - the United States in particular - would be the best means to improve local conditions.

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[169] For an excellent overview, see Jeff Victoroff, "The Mind of the Terrorist" *Journal of Conflict Resolution* 49, no. 1 (2005): 3-42; see also Walter Reich (ed.), *Origins of Terrorism: Psychologies, Ideologies, Theologies, States of Mind* (Washington, DC: Woodrow Wilson Center Press, 1998).

[170] Jessica Stern, *Terror in the Name of God: Why Religious Militants Kill* (New York, Ecco, 2003), 9-62.

[171] See, e.g., Vamik D. Volkan, *Bloodlines: From Ethic Pride to Ethnic Terrorism* (Boulder, CO: Westview, 1997); Cass R. Sunstein, "Why They Hate Us: The Role of Social Dynamics," *Harvard Journal of Law and Public Policy* 25, no. 2 (2002): 429-40. On the idea of cultural humiliation see Bernard Lewis, *What Went Wrong? Western Impact and Middle Eastern Response* (New York: Oxford University Press, 2002).

[172] Cited in Mark Juergensmeyer, *Terror in the Mind of God: The Global Rise of Religious Violence* (Berkely, CA: University of California Press, 2000) 187.

[173] See, e.g., Jason Burke, "Think Again: Al Qaeda", *Foreign Policy*, Iss. 142 (May/June 2004): 18-26.

This phenomenon is not limited to Islamist terrorism. The lack of political and societal reforms also played a significant role in the emergence of left-wing extremism and terrorism in Europe in the 1970s and 80s.[174] In response, several governments introduced a wide array of repressive counter-measures including special security laws that curtailed civil liberties and human rights to a significant extent. Rather than leading to a decline of violence and civil unrest, however, the measures taken often undermined safety as personal injustices increased and channels for expressing discontent and altering the political, legal and social structures were closed. A comparable development may also occur as a consequence of the domestic counter-measures introduced in the aftermath of the 9/11 attacks. Intrusive anti-terrorism laws are particularly problematic in this respect. Perceived as repressive and discriminatory these laws may lead to an inflamed sense of grievance and injustice, especially among the Muslim community. This in turn could further alienate and isolate even so-called moderates and foster sympathy and support for religious fanatics. However, it is arguably the cooperation of Muslim communities that is needed to effectively manage the threat of a good deal of contemporary terrorism.

While research in this regard is still in its infancy, the possibility of alienation of some members of the Muslim community has been confirmed by studies undertaken in both the United Kingdom and Australia. The first of these studies was commissioned by the Islamic Human Rights Commission (UK).[175] The study, published in late 2004, found that the Muslim experience of discrimination ranged from hostile behaviour to abuse, harassment, assault and alienation. About 80 percent of respondents reported that they had experienced discrimination because they were Muslim, a figure that had dramatically increased since 2001.

A second study was conducted by the Institute of Race Relations (UK) and specifically focused on Britain's anti-terrorism laws.[176] Examining 287 out of the 609 arrests made in the aftermath of 9/11 (up until mid-2004), the study revealed that there was a considerable gap between the number of arrests made and the number of convictions achieved. Indeed, the low conviction rate among those arrested - only fifteen convictions had been secured at the time– would point to an excessive use of arrest powers against Muslim communities. This finding was further supported by the discrepancy between the religious background of those arrested and those convicted. While the overwhelming

[174] For in-depth analysis see, e.g., Peter H. Merkl, "West German Left-Wing Terrorism," in Martha Crenshaw (ed.), *Terrorism in Context* ((Philadelphia, PA: Pennsylvania State University Press, 1995) 160-210; Peter Chalk, *West European Terrorism and Counter-Terrorism: The Evolving Dynamic* (Houndsmill: Macmillan Press, 1996).
[175] Saied R. Ameli, Manzur Elahi, and Arzu Merali, *Social Discrimination: Across the Muslim Divide* (Islamic Human Rights Commission, 16 December 2004), <http://www.ihrc.org.uk/show.php?id=1285>.
[176] Institute of Race Relations (UK), "Arrests under anti-terrorism legislation since 11 September 2001," Study (September 2004), available at <http://www.irr.org.uk/pdf/terror_arrests_study.pdf>.

majority of those arrested were Muslims, the majority of those convicted appeared to be non-Muslims. Studies in Australia have reached similar conclusions. These will be subjected to closer analysis in Chapter 6.

4. Practical Objections

Finally, the image of balancing liberty against security is problematic for two practical reasons. First, it is important to recognise that civil liberties are not diminished equally for everyone when "balanced" against "national security". As Ronald Dworkin has pointed out:

> None of the administration's decisions and proposals will affect more than a tiny number of American citizens: almost none of us will be indefinitely detained for minor violations or offenses, or have our houses searched without our knowledge, or find ourselves brought before military tribunals on grave charges carrying the death penalty. Most of us pay almost nothing in personal freedom when such measures are used against those the President suspects of terrorism.[177]

Second, even if one accepts that civil liberties and human rights can be balanced against national security, it is not clear whether the counterterrorism measures introduced in the aftermath of the 9/11 attacks actually increase security or merely diminish liberty. Indeed, it appears that those who advocate the balancing approach often have little idea whether the counterterrorism measures introduced actually reduce the threat of terrorism. It is thus imperative to examine the extent to which (legislative) counter-measures are based on fair estimates of actual consequences rather than on the felt need for reprisal or the comforts of purely symbolic action. Jeremy Waldron has illustrated the gap between symbolism and effectiveness by referring to the reduction of due process guarantees:

> A reduction in due process guarantees may make it more likely that terrorist suspects will be convicted. And that, people will say, is surely a good thing. Is it? What reason is there to suppose that our security is enhanced by making the conviction and punishment of suspects more likely? We know that the conviction and punishment of an Al-Qaeda fanatic, for example, will have no general deterrent effect; if anything, it will have the opposite effect - making it more rather than less likely that the country punishing the suspect is subject to terrorist attack. Of course, this is not a reason for not punishing the perpetrators of murderous attacks, but the reasons for punishing them are reasons of justice, not security (via general deterrence); and those reasons of justice may not be as separable from the scheme of civil liberties that we are currently trading off as the 'new balance' image might suggest.[178]

[177] Dworkin, "The Threat of Patriotism."
[178] Waldron, "The Image of Balance," 209-10.

It is beyond question that it can be difficult to make fair estimates on the effectiveness of counter-terrorism measures.[179] However, the difficulty of the task cannot be an excuse for the lack of thorough analysis and sound decision-making. An in-depth analysis should include an examination of the experiences from previous terrorism crises and comparable campaigns such as the so-called "war on drugs". As far as left-wing terrorism in Europe in the 1970s and 80s is concerned, for example, it is highly questionable whether repressive counter-measures and intrusive anti-terrorism laws did play a significant part in the decline of terrorist organisations.[180] Similarly, in the context of the "war on drugs", a campaign which in many aspects may be compared to counter-terrorism, there is little compelling evidence to suggest that requiring higher standards of due process and protection of human rights impeded effective law enforcement.[181]

IV. The Need for Proportionality

It has been shown that the balance metaphor is inappropriate to describe the process of reconciling respect for civil liberties and human rights with the (alleged) imperatives of national security. But what is the significance of this argument? Does it really matter? Or is the critique of the balance metaphor merely an "airy fairy" academic exercise without any practical implications? And, what is more, is there an alternative?

Some commentators – including those critical of some of the counter-measures adopted in the aftermath of 9/11 – have suggested that using the image of balance might be necessary to facilitate and foster broader public debate on the problem of curtailing civil liberties and human rights in the name of national security. George Williams, for instance, accepted that it may be problematical and inaccurate to refer to the process as "balancing". Nevertheless, he prefers employing the balance metaphor in public discourse in order to "capture in the public mind what is involved."[182] 'The nature of public discourse, so Williams, is "that these things are difficult to communicate except where a metaphor is used."[183]

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[179] See e.g. Christopher Hewitt, *The Effectiveness of Anti-Terrorist Policies*, (Lanham, MD: University Press of America, 1984) 19-23.
[180] See e.g. Christoph Rojahn, "Left-Wing Terrorism in Germany: The Aftermath of Ideological Violence," *Conflict Studies* 313 (1998): 1-17.
[181] See, e.g., Simon Bronitt, 'Constitutional Rhetoric versus Criminal Justice Realities: Unbalanced Responses to Terrorism?', *Public Law Review* 14, no. 1 (2003): 76-80.
[182] Email from George Williams to the author, 16 May 2005.
[183] Ibid.

At first, the argument advanced by Williams seems to make sense. Using simple metaphors to explain difficult and complex problems is indeed helpful to communicate with the broader public. However, the use of metaphors becomes problematical when academics, policy makers and legislators adopt the terminology and the concept uncritically. This then leads to an unwarranted reduction of the complexity and scope of the issues at hand. Furthermore, it leads to sloppy reasoning, faulty decision-making and, ultimately, to fundamentally flawed public policy. It appears that this is exactly what has happened in the case of the balance metaphor being employed in the context of civil liberties, human rights and national security. In this case the "balance" appears to routinely tip towards security. Yet, little effort is usually made to enquire whether counter-terrorism measures that impair human rights and civil liberties diminish the terrorist threat or whether other, less repressive, measures are available to reach the objective at hand.

The question, of course, is whether an alternative exists to the "balancing" approach. It is submitted here that it is preferable to apply an analysis based on the principle of proportionality. What the principle of proportionality generally requires is that there is a reasonable relationship between the means employed and the aims sought. Essentially proportionality requires one to determine whether a measure of interference which is aimed at promoting a legitimate public policy objective is neither unacceptably broad in its application nor imposes an excessive or unreasonable burden on certain individuals. Generally speaking, public policy that takes into account the principle of proportionality should, *inter alia*, be carefully designed to meet the objectives in question and not be arbitrary, unfair or based on irrational considerations. In addition, it should impair human rights, civil liberties and the rule of law as little as possible and provide adequate mechanisms of review.

1. Proportionality as a Principle of Law, Public Policy and Good Governance

An analysis based on the principle of proportionality is an analytical procedure which does not, in itself, produce substantive outcomes or answers to legal and policy problems. It is rather a decision-making procedure and an analytical structure that leads to the formulation of an opinion concerning policy implementation and which usually deals with tensions between two pleaded legal or political values and/or public policy goals.[184] As Alec Stone Sweet and Jud Mathews have noted, proportionality analysis is a doctrinal construction which "emerged and then diffused as an unwritten, general principle of law through judicial recognition and choice."[185] Proportionality,

[184] Mattias Kumm, "Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice," *International Journal of Constitutional Law* 2, no. 3 (2004): 574-96.
[185] Alec Stone Sweet and Jud Mathews, "Proportionality Balancing and Global Constitutionalism," *Columbia Journal of Transnational Law* 47, no. 1 (2008): 75.

however, is not only a judicial doctrine for courts to apply in reviewing the legality of government action. It is also a legislative doctrine for the political institutions to observe in their decision-making functions.[186] As such, it forms an essential component of public policy and good governance.[187]

As a general principle of law, some form of proportionality is found in most legal systems. At the international level, for instance, the proportionality principle features prominently in the framework of international law and relations.[188] It is a key component of traditional just war theory which stipulates, *inter alia*, that force may be used only after all peaceful and viable alternatives have been seriously tried and exhausted.[189] Just war theory further requires that the anticipated benefits of waging a war must be proportionate to its expected evils or harms. In contemporary international law, proportionality is a key requirement of lawful self-defence. While Article 51 of the United Nations Charter (self-defence) does not mention the principle explicitly, it is commonly agreed that the right of self-defence is limited by the principles of necessity and proportionality.[190] The principle of proportionality also plays an important role in the emerging doctrine of humanitarian intervention and the so-called responsibility to protect[191] as well as in international humanitarian law (*jus in bello* or the laws of war).[192]

At the national level, many liberal democratic systems recognise the principle of proportionality as a key component of criminal, administrative and constitutional law. In its domestic application, however, the principle is usually framed more strictly than it is in the sphere of international law. It is, for instance, readily applied in criminal justice policy and criminal law where the severity of punishment is expected to be proportionate to the seriousness of the crime. The proportionality

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[186] Nicholas Emiliou, *The Principle Of Proportionality In European Law: A Comparative Study* (The Hague: Kluwer, 1996) 142.

[187] See also Andrew Blick, "Democratic Audit: Good Governance, Human Rights, War against Terror," *Parliamentary Affairs* 58, no. 2 (2005): 408-23.

[188] Judith Gardam, *Proportionality, Necessity and Force in International Law* (Cambridge: Cambridge University Press, 2004); Judith Gardam, "Proportionality and Force in International Law," *American Journal of International Law* 87, no. 3 (1993): 391-413.

[189] See, e.g., Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977); Nicholas Rengger, "On the Just War Tradition in the Twenty-first Century," *International Affairs* 78, no. 2 (2002): 353-63.

[190] In the context of self-defence proportionality means that any measures taken in response to an armed attack must neither be retaliatory nor punitive in nature but rather aimed at halting and repelling an attack. See, e.g., Stanimir A. Alexandrov, *Self-Defence against the Use of Force in International Law* (The Hague: Kluwer, 1996); Yoram Dinstein, *War, Aggression and Self-Defence*, (Cambridge: Cambridge University Press, 4th ed., 2005); Don W. Greig, "Self-Defence and the Security Council: What does Article 51 Require?" *International Comparative Law Quarterly* 40, no. 2 (1991): 366-402. For a discussion of proportionality in the context of the "War on Terror", see, e.g., Judith Gardam, "A Role for Proportionality in the War on Terror," *Nordic Journal of International Law* 74, no. 1 (2005): 3-25.

[191] See, e.g., Sean D. Murphy, *Humanitarian Intervention: the United Nations in an Evolving World Order* (Philadelphia, PA: University of Pennsylvania Press, 1996).

[192] For example, contemporary international humanitarian law stipulates that an attack cannot be launched on a military objective in the knowledge that the incidental civilian injuries would be clearly excessive in relation to the anticipated military advantage.

principle, moreover, is often considered to be a fundamental element of regulative policy and public administration. It has been described as a defining principle of limited government and a key requirement of good governance.[193] In this context, proportionality is used as an analytical and evaluative tool for regulative policy and concerns the ends of public action and the means used to attain them. As Robert Thomas has explained:

> To achieve its objectives the administration must adopt effective means of policy implementation since the justification for the very existence of public administration is to realise collective goals through programmes of state action. In so doing the administration may adversely affect the interests of a private individual. It would be an impossible task for the administration to fulfil social needs and avoid any such interference. Clearly, private interests have to be subordinated to the greater public good. However, it may be argued that the extent of the interference was unnecessary since the public goal could have been achieved through different means. (...) If there are alternative means, less restrictive of the individual's interests but equally effective for the realisation of the public objective, then the interference is unnecessary and disproportionate.[194]

The proportionality principle in regulative public policy and administration finds its origins in German constitutional and administrative jurisprudence.[195] Over the past fifty years, however, it has become a preferred procedure for managing disputes involving an alleged conflict between two rights claims, or between a rights provision and a legitimate state or public interest.[196] From its German origins, the proportionality analysis spread across Europe into Commonwealth systems including England, Canada, New Zealand, South Africa, and Israel.[197] In Australia it still awaits formal recognition in public policy and administrative law.[198] However, senior judges have started to debate the merits of proportionality intensively.[199]

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[193] Alice Ristroph, *Proportionality as a Principle of Limited Government*, Utah Legal Studies Paper No. 05-19 (2005); <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=851624>. On proportionality as a principle of good governance, see, e.g., Linda Senden, *Soft Law in European Community Law* (Oxford: Hart Publishing, 2004), 86-88.

[194] Robert Thomas, *Legitimate Expectations and Proportionality in Administrative Law* (Oxford: Hart Publishing, 2000), 77.

[195] See, e.g., Helmut Goerlich, "Fundamental Constitutional Rights: Content, Meaning and General Doctrines." in Ulrich Karpen (ed.), *The Constitution of the Federal Republic of Germany* (Baden-Baden: Nomos, 1988) 45-65; Stone Sweet and Mathews, "Proportionality Balancing and Global Constitutionalism," 98-111.

[196] Stone Sweet and Mathews, "Proportionality Balancing and Global Constitutionalism Proportionality", 99.

[197] See e.g. Stone Sweet and Mathews, "Proportionality Balancing and Global Constitutionalism," 112-38; Erik Erling, Ron Kugan and Jakob Schnaider, "The Principle of Proportionality: A Comparison between Canada and the European Community Law," paper presented at the Faculty of Law, University of Lund, 24 February 2006, 4-13. Even before the enactment of the *Human Rights Act* 1998, English courts were familiar with proportionality. The concept has much in common with that of reasonableness and it is likely to produce the same result as would come from the application of a test of reasonableness. The concept of *Wednesbury* unreasonableness, however, is narrower. In *Council of Civil Service Unions v Minister for the Civil Service,* Lord Diplock raised the possibility of importing the European concept of proportionality as a ground of domestic judicial review, but this was rejected by the House of Lords in *R v Secretary of State for the Home Department; Ex parte Brind.* However, when the English courts apply Community law, and the *Human Rights Act* 1998, questions of proportionality arise.

[198] Thomas, *Legitimate Expectations and Proportionality in Administrative Law*, 77.

[199] See e.g. Murray Gleeson, "Address at the Australian Bar Association Conference: Global Influences on the Australian Judiciary," 8 July 2002; <http://www.hcourt.gov.au/speeches/cj/cj_global.htm>.

The principle of proportionality has also migrated to international treaty-based regimes, including the European Union, the World Trade Organisation the Council of Europe and the international system of human rights.[200] In the European Union, for instance, proportionality is enshrined in Community law through Article 5.3 of the European Union Treaty which stipulates that "any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty." In this context, the proportionality principle gives rights to individuals that no action shall be taken against them that goes further than necessary to achieve the goals of the action – this applies to both Member State actions and to Community actions.[201] The European Commission subsequently adopted this approach in its White Paper on European Governance, in which the term "European governance" refers to the rules, processes and behaviour that affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence. These five "principles of good governance" reinforce those of subsidiarity and proportionality and "underpin democracy and the rule of law in the Member States, but they apply to all levels of government – global, European, national, regional and local."[202]

In the international human rights system, proportionality plays a key role in the application of international instruments such as ECHR and the ICCPR. A number of the articles in these instruments contain provisions which expressly invoke proportionality. For example, rights to respect for private and family life, to freedom of thought, conscience and religion, and to freedom of expression, assembly and association, are not absolute, but any interference with them may only be such as is necessary in a democratic society for the protection of public order, health or morals, or the protection of the rights of others.[203] Also, both conventions stipulate that in times of emergency certain specified rights may be derogated from only "to the extent strictly required by the exigencies of the situation."[204] This is an express reference to the principle of proportionality, which is subject to review by the Human Rights Committee and represents "the most important limitation on permissible derogation measures."[205] As Manfred Nowak has noted:

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[200] For proportionality analysis in the WTO, see e.g. Stone Sweet and Mathews, "Proportionality Balancing and Global Constitutionalism," 153-60.

[201] See e.g. Erik Erling, Ron Kugan and Jakob Schnaider, "The Principle of Proportionality: A Comparison between Canada and the European Community Law," 14-20. While the principle is enshrined in the text of the treaty, it first affected EC law in the *Internationale Handelsgesellschaft* case which stands for the proposition that a public authority may not impose obligations on a citizen except to the extent to which they are strictly necessary in the public interest to attain the purpose of the measure; Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

[202] Commission of the European Communities, *European Governance – A White Paper*, COM (2001) 428, 25 July 2001, <http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf>.

[203] See, e.g., Evelyn Ellis, *The Principle of Proportionality in the Laws of Europe* (Oxford: Hart Publishing, 1999); Marc-André Eissen, "The Principle of Proportionality in the Case-Law of the European Court of Human Rights," in Ronald St J Macdonald, Franz Matscher and Herbert Petzold (eds.), *The European System for the Protection of Human Rights* (Dordrecht: Martinus Nijhoff, 1993), 125-37.

[204] Article 4 (1) of the ICCPR, Article 15 (1) of the ECHR.

[205] Nowak, *CCPR Commentary*, 84.

> The degree of interference and the scope of the measure (both territorially and temporally) must stand in reasonable relation to what is actually necessary to combat an emergency threatening the life of the nation. The principle of proportionality requires that the necessity of derogation measures be reviewed at regular intervals by independent national organs, in particular, by the legislative and judicial branches.[206]

The duty to review derogating emergency measures as contained in human rights instruments such as the ECHR and ICCPR is highly significant as it adds another dimension to the principle of proportionality. It basically stipulates that in order to remain proportionate extraordinary measures introduced to combat an emergency must be reviewed by government even in the absence, or irrespective of any review undertaken by courts in the context of a judicial challenge. This means that a further procedural aspect is added to the proportionality principle that examines the legitimacy of a public policy measures beyond its inherent nature and content.

2. The Proportionality Test in Regulative Public Policy and Administration

The proportionality principle in regulative public policy and administration may be summarized by Lord Diplock's aphorism "why use a steam hammer to crack a nut, if a nutcracker would do?"[207] In its application the proportionality principle requires a test consisting of three main requirements.[208] First, any measure of public policy impairing the citizen's rights and liberties must generally be suitable. Second, the measure must be necessary. Third, it must be appropriate and strictly proportionate. This last step is also known as proportionality in the narrow sense or proportionality *stricto senso*. The three-step test is generally preceded by a preliminary step, at the so-called legitimacy stage, at which it needs to be established whether the government is constitutionally authorised to take the measure in question. As far as domestic legislation in federal States like Australia and Germany is concerned, it is to be considered, for instance, whether the federal Parliament possesses the competency to legislate in the area under consideration.

The first step of the proportionality test concerns suitability and is devoted to verification that, with respect to the measure in question, the means adopted by the government are rationally related to stated policy objectives. The requirement of suitability is usually very broadly defined and means that the government must only introduce legislative measures that are generally suitable to achieve

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[206] Ibid.

[207] *R v Goldschmidt* [1983] 1 WLR 151, 155 per Diplock, quoted in Emiliou, 2.

[208] See generally Michalowski and Woods, *German Constitutional Law: The Protection of Civil Liberties*, 69-93; Christoph Engel, "The Constitutional Court - Applying the Proportionality Principle - as a Subsidiary Authority for the Assessment of Political Outcomes," Max Planck Institute Collective Goods Preprint No. 2001/10; <http://ssrn.com/abstract=296367>.

the intended purpose. In fact, "suitability" might be more precisely defined in negative terms that no completely unsuitable measure may be taken.

The second step, necessity, has more bite. The core of necessity analysis is the deployment of a least-restrictive means test. This requires the government to ensure that the measure does not curtail individual rights any more than is necessary to achieve stated public policy goals. As such, the proportionality principle's requirement of necessity relates to the scope of the government's intervention and to the question of whether the legislative measure under consideration is warranted by the exigencies of the situation. It means that the government must refrain from interfering with the citizen's (possibly constitutionally protected) civil liberties and human rights if it can accomplish the same aim without interference with those rights and freedoms at all, or by resorting to a less drastic measure. If the government's measure in question fails on suitability or necessity, the act is *per se* disproportionate.

The last step is the most complex. It requires an analysis of whether the measure is appropriate and strictly proportionate. The requirement of appropriateness means that legislative action by the government is unacceptable if the burden created thereby is disproportionate to the purpose of the measure. According to the so-called Wesengehaltsgarantie (guarantee of materiality) used in German constitutional and administrative law, for instance, a burden is particularly disproportionate if it affects the "essential content" ("Wesengehalt") or the very nature of the right or freedom which is impaired. This is to ensure that the restriction does not jeopardise the right itself. The requirement of appropriateness also entails that the more the administrative action affects fundamental expressions of human freedom of action, the more careful the reasons serving as its justification be examined against the principal claim to liberty of the citizen.[209]

3. Implications for the Analysis of the Australian Response to the Threat of Terrorism

Australia has come late to the proportionality principle. In Australian administrative and constitutional law, the concept of proportionality has so far been applied in rather limited fashion. For example, proportionality has not been accepted as a separate ground for judicial review of administrative action, although the possibility was raised by Justice Deane in the case of *Australian Broadcasting Tribunal v Bond.*[210] However, over the previous two decades, the High Court of

[209] See also German Federal Constitutional Court, BVerfGE 17, 306, 314 (1963).
[210] Deane J in *Australian Broadcasting Tribunal v Bond* , (1990) 170 CLR 321 at 367. In *Workchoices* a majority of the High Court affirmed a line of jurisprudence rejecting the general use of proportionality in characterisation of Commonwealth laws, (2006) 229 CLR 1, [142] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

Australia has adopted the use of a proportionality-type test in the area of constitutional guarantees, freedoms and immunities.[211] Nonetheless, despite these developments the precise content of the Australian proportionality test is yet to be fully developed. The High Court, for instance, has not adopted the logic of the three-step test used, *inter alia*, in Germany and Canada.[212] The Court's use of proportionality in relation to implied rights and the underdeveloped nature of the proportionality test have attracted particular criticism from scholars.[213] At the same time, as Gabrielle Appleby has noted, proportionality in its more ubiquitous form – reasonably "appropriate and adapted" for the achievement of a legitimate governmental objective – is not heretical to Australian judicial methodology.[214]

In spite of the uncertain application and ambiguous scope of the proportionality principle in the context of judicial review in Australian constitutional and administrative law, Australian authorities have an obligation under international law to consider the proportionality principle when introducing measures that affect the rights of individuals. This obligation stems primarily from the ICCPR – to which Australia became a party in 1980 - but it is also part of other international instruments such as the Convention on the Rights of the Child. In the context of counter-terrorism, the obligation is further underlined by a range of Security Council resolutions that call on States to ensure "that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law."[215] As noted by the UN Commissioner for Human Rights as well as by the UN Special Rapporteur on the Protection and Promotion of Human Rights and Fundamental Freedoms while Countering Terrorism (in his country report on Australia), when introducing new laws to combat terrorism, the Australian government is thus obliged to undertake an assessment of whether the proposed measures are necessary and proportionate to the threat it seeks to counter.[216] This obligation includes an assessment of whether the particular measure adopted is the least restrictive means of achieving a

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[211] Gabrielle J. Appleby, "Proportionality and Federalism: Can Australia Learn from the European Community, the US and Canada?" *University of Tasmania Law Review* (forthcoming); <http://ssrn.com/abstract=1300082>; 8.

[212] In part, this may be explained by the absence of a constitutional bill of rights or any other instrument explicitly protecting human rights in Australia. In the United Kingdom, for instance, it was precisely the *Human Rights Act* 1998 – legislation that incorporated the United Kingdom's obligations under the European Convention of Human Rights into British law – that saw the introduction of the continental proportionality test into British law.

[213] See, e.g., Brian F. Fitzgerald, "Proportionality and Australian Constitutionalism," *University of Tasmania Law Review* 12, no. 2 (1993): 261-72; Jeremy Kirk, "Constitutional Guarantees, Characterisation and the Concept of Proportionality," *Melbourne University Law Review* 21, no. 1 (1997): 1-28.

[214] Appleby, "Proportionality and Federalism," 2.

[215] See, e.g., UN Security Council Resolution 1456 (2003), para.6.

[216] See, e.g., Joint Statement by UN High Commissioner for Human Rights, the Secretary-General of the Council of Europe and the Director of the OSCE Office for Democratic Institutions and Human Rights, 29 November 2001, <http://www.unhchr.ch/huricane/huricane.nsf/view01/4E59333FFC5341A7C1256B13004C58F5>; see also Message by 17 independent experts of the Commission on Human Rights on the occasion of Human Rights Day, 10 December 2001, UN Doc E/CN.4/2002/137, Annex 1.

legitimate protective purpose as well as a requirement to explain the importance of any individual right affected and the seriousness of the interference with the right.

The proportionality principle, however, is also applicable in Australian public policy as a general principle of limited government and good governance. This means that apart from its obligations under international law, the Australian government is required to observe the proportionality principle in its decision-making functions. Rather than an instrument of judicial review only, the concept of proportionality principle thus also forms a tool for policy development and analysis. In the context of Australian counter-terrorism law and policy, the applicability of the concept of proportionality has been recognised by independent and Parliamentary committees as well as the Inspector-General of Intelligence and Security.[217] The Security Legislation Review Committee [the Sheller Committee], for instance, stressed the need for proportionality in achieving the intended object of security and noted that "legislation must be well framed and have sufficient safeguards to stand the test of proportionality and fairness."[218] Likewise, the Inspector-General of Intelligence and Security, in his 2004 -2005 annual report, noted that there is "a vital public interest in ensuring that any new measures to protect national security which have been implemented, or are presently being contemplated, should not be unduly corrosive of the values, individual liberties and mores on which our society is based."[219] Nevertheless, despite stressing the importance of proportionality, none of the committees (or any other institution for that matter) has submitted the Australian government's domestic response to the threat of terrorism to a comprehensive proportionality test. In fact, to this day, such an analysis remains to be undertaken.

V. The Proportionality Approach Used in this Thesis

As has been demonstrated, it is appropriate to apply the proportionality principle to an analysis of Australia's domestic response to the threat of terrorism. But how does the proportionality principle need to be applied specifically? Put simply, it is imperative to examine whether the Australian government has demonstrated that its domestic anti-terrorism measures were necessary to counter the threat posed to the Australian community by terrorism, and that these measures constituted a proportionate response to that threat. As the Sheller Committee has noted, this entails an analysis of whether the Government's measures were a "proportionate means of achieving the intended object

[217] See, e.g., Report of the Security Legislation Review Committee (Canberra: AGPS, 2006), 3 [hereinafter "Sheller Report"].
[218] Sheller Report, 3.
[219] Inspector General for Intelligence and Security, Annual Report 2004-2005, 2.

of protecting the security of people living in Australia (...), including protecting them from threats to their lives."[220]

In order to establish whether the Australian government's domestic response meets the objectives in question it is firstly necessary to identify clearly what those objectives are. The main objective of anti-terrorism legislation will generally be an increase in security by addressing the threat of terrorist attacks or activities. Thus it is logically necessary for a thorough proportionality analysis to consider or assess the quality and nature of the threat to Australia. In the absence of such analysis, any proportionality assessment is incomplete. As a consequence, Chapter 3 will examine how the threat of terrorism has been portrayed by the Australian government. Given that this assessment is found to be flawed and subject to a range of considerable misunderstandings and exaggerations, a re-assessment of the nature and scope of the terrorism threat to Australia will be undertaken in Chapter 4.

In a second step, it needs to be established whether Australia's domestic counter-measures were suitable, necessary and strictly appropriate to achieve the stated policy objectives of increasing Australia's security. In order to formulate an informed opinion about the proportionality of the Government's counter-terrorism law and policy, Chapters 5-7 will thus subject the responses to critical analysis. The proportionality analysis will need to include an assessment of whether the anti-terrorism legislation contains clearly defined key terms to ensure clarity and certainty, whether it provides limits on the scope of criminal liability, and whether it avoids arbitrary or inconsistent application. It will also be necessary to examine whether the legislation complies with Australia's international human rights obligations and rule of law principles, whether it contains mechanisms for independent, regular and comprehensive review of both the content and the operation of Australia's anti-terrorism measures, and whether it includes safeguards to protect against overuse or misuse of executive power, such as judicial oversight of the exercise of executive power.

[220] Sheller Report, 3.

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THE HOWARD GOVERNMENT'S ASSESSMENT OF THE TERRORIST THREAT TO AUSTRALIA

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I. Introduction

When four hijacked planes crashed into the World Trade Center in New York City, the Pentagon, in Washington D.C. and into a remote field in Pennsylvania on the morning of 11 September 2001, most Australians were about to go to bed or asleep already. Not so their Prime Minister, John Howard who had flown into Washington on Saturday 8 September 2001 for an extensive working visit that included the first face-to-face meetings with President George W. Bush and key members of his administration. Three days later, however, Howard found himself at the epicentre of the emotional firestorm that engulfed the United States in the aftermath of the unprecedented terrorist attacks. Howard's presence in Washington and his first-hand experience of the surreal and dramatic events that unfolded on 9/11 doubtless forged his close personal relationship with President Bush and had a lasting impact on his approach to the challenges associated with the evaluation of the threat of international terrorism back home.

The first three days of the Prime Minister's visit to Washington had been both pleasant and productive. Upon arrival on 8 September, Howard and his entourage had checked into the historic Willard Hotel, just two blocks from the White House.[221] The first event of the official program had been a casual barbecue at the residence of the Australian Ambassador in the evening of Sunday 9 September 2001 where the Prime Minister had met several prominent guests including Vice President Dick Cheney, Secretary of State Colin Powell, Secretary of Defense Donald Rumsfeld, White House Chief of Staff Andrew Card, as well as several other high profile personalities of the Washington political circuit. As the Australian Ambassador to the United States, Michael Thawley, recalled, this "beautiful autumn night is remembered by a large number of prominent people in Washington as the last idyllic evening before the attacks and the new era."[222] The next morning, on Monday 10 September 2001, Howard had met President Bush for the first time at a ceremonial occasion at the Washington Naval Dockyards and aides on both sides had been delighted that the two leaders got along very well without any "difficulty" or "awkwardness."[223]

On 11 September 2001, Howard was scheduled to open a business forum at the US Chamber of Commerce, presumably to build momentum for a free-trade agreement between Australia and the

[221] The description of Prime Minister Howard's visit in Washington D.C. in the days surrounding 11 September 2001 draws largely on the information provided by Donald Debats, Tim McDonald and Margaret-Ann Williams, "Mr Howard Goes to Washington: September 11, the Australian-American Relationship and Attributes of Leadership," *Australian Journal of Political Science* 42, no. 2 (2007): 231-51. This article is based on several interviews with John Howard and other members of his staff at the time. Also see, Joseph M. Siracusa, "John Howard, Australia, and the Coalition of the Willing," *Yale Journal of International Affairs* 1, no. 2 (2006): 39-49.
[222] Cited in Debats, McDonald and Williams, 237.
[223] Ibid.

United States. The Prime Minister was in his hotel room preparing for a short informal press conference with Australian journalists before his departure to the business forum when his press secretary, Tony O'Leary, knocked on the door and informed him that a plane had struck the World Trade Center. As Howard recalled:

> I think I flicked on the television and then, it wasn't long after, the second one ... he told me the second one had gone in as I walked around to the news conference. At that stage, like everybody else, I was bewildered ... it was during the news conference, I believe, the plane hit the Pentagon. After the news conference was over, I think I pulled the blind aside and could see the smoke billowing from the Pentagon building.[224]

A few minutes later, Howards's personal protection details from the Australian Federal Police (AFP) and the US Secret Service decided that there was an urgent need to get the Prime Minister somewhere safer. Howard and his staff were rushed to the Australian Embassy, nine blocks away, where they spent the rest of the day in the second sub-basement, a windowless maintenance area below street level with a makeshift kitchen, dusty tables and broken chairs. Having witnessed the Pentagon burning a few hundred meters away and having watched the World Trade Center's twin towers collapse live on television, Howard experienced the events of 9/11 in a direct way that no other foreign leader did. In 2003 he recalled:

> The shock, the disbelief and the realisation came slowly at first but then with a rush, that this was an event that was going to change the way we lived. (...) I couldn't get out of my mind the desperation of the people who were trapped in those buildings and the sense of loss and despair of those families.[225]

After consulting with Australian officials assembled in the Embassy's sub-basement and with key Cabinet members in Canberra in the middle of the night, the Prime Minister personally drafted a short letter to President Bush expressing horror at the loss of life and pledging "Australia's resolute solidarity with the American people at this most tragic time."[226] He then arranged to withdraw in advance from any obligation to proceed with his address to a joint session of the US Congress which was scheduled for 12 September 2001. Instead, he decided to offer his sympathy in a low-key informal appearance on Capitol Hill as a "gesture of support and empathy."[227] The next day, the Prime Minister's party was escorted to the normally packed visitors gallery where he, his wife, Ambassador Thawley and an embassy staffer were the only audience. Congress resumed and the Speaker announced the presence of the Australian Prime Minister. All 435 members stood, pivoted

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[224] Ibid, 238. See also Transcript of Interview with Prime Minister Howard, Mike Munro, a Current Affair, Network Nine, Washington, D.C., 12 September 2001, <http://canberra.usembassy.gov/irc/us-oz/2001/09/12/pm2.html>.

[225] Quoted in Anne Summers, *The Day That Shook Howard's World*, 17 February 2007, <http://www.annesummers.com.au/documents/smh070217.pdf>.

[226] Cited in Debats, McDonald and Williams, 239.

[227] Cited in ibid, 247.

and gave a standing ovation. Howard physically started shaking, his wife patted him, and the applause went on for a while.[228] Two days later, the Prime Minister returned to Canberra and invoked Article IV of the ANZUS Pact, the first Australian prime minister to do so since the treaty was concluded in 1951.[229] At a press conference on 14 September 2001 he declared:

> As I indicated in Washington and I repeat today, and it's the unanimous view of the Cabinet, that Australia stands ready to cooperate within the limits of its capability concerning any response that the United States may regard as necessary in consultation with her allies. (...) at no stage should any Australian regard this as something that is just confined to the United States. It is an attack upon the way of life we hold dear in common with the Americans. It does require the invocation of ANZUS.[230]

In one sense, since America's NATO partners had immediately invoked their treaty in support of an assaulted member, it would have itself been surprising had not America's closest Pacific ally done the same. What is the surprising, however, is that the Prime Minister had already concluded that the attacks on the United States also constituted a clear and present danger to Australia's peace and security. Mirroring the language used by President Bush in his statement to the nation on 11 September 2001, Howard declared the 9/11 attacks as an assault not only on America but on the "way of life" of all Australians. It was clear that "terrorism" was going to be one of the defining issues on the domestic and international political agenda for years to come. And while the attacks had taken place in the United States, there also seemed to be little doubt that Australia was subject to a serious terrorist threat itself. In the months and years that followed the events of 9/11, this conclusion found itself repeated in numerous statements by the Prime Minister and other government representatives as well as in major policy documents and reports. But why was Australia perceived to be a target for terrorist attacks?

This chapter will examine how this perceived threat of terrorism was assessed and presented by the Howard government in official statements and public comments as well as in publicly available documents and reports. The analysis will focus on statements made and reports issued in the years 2001 to 2007. Particular attention will be drawn to the 2004 White Paper on Transnational

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[228] Ibid, 248.

[229] For the history of the ANZUS Pact see, e.g., Joseph M. Siracusa and David G. Coleman, *Australia Looks to America: Austraian-American Relations since Pearl Harbor* (Claremont, CA: Regina Books, 2006), 33-50.

[230] "Government Invokes ANZUS Treaty," Prime Minister's Press Conference, 14 September 2001, <http://australianpolitics.com/foreign/anzus/01-09-14anzus-invoked.shtml>.
Article IV of the ANZUS Treaty reads: Each Party recognizes that an armed attack in the Pacific Area on any of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes. Any such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

Terrorism[231] as well as the 2006 Protecting Australia against Terrorism.[232] In many ways the 2004 White Paper encapsulates the key arguments put forward by Howard government as to why Australia was believed to be a target for terrorist attacks. Other reports that will be analysed include the annual reports to Parliament by Australia's domestic intelligence agency, the Australian Security Intelligence Organisation (ASIO), and the 2003 White Paper on Foreign Affairs and Trade entitled "Advancing the National Interest".[233] The chapter will demonstrate that the Howard government's narrative of the threat of international terrorism drew heavily on the rhetoric of the Bush administration, both as far as content and explicit metaphors were concerned. It will also argue that the public assessments in Australia were fundamentally flawed and subject to a range of considerable misunderstandings and exaggerations.

II. Government Rhetoric and Documentary Evidence

1. The Howard Government's Adoption of the Bush Administration's Rhetoric

At the time Prime Minister Howard and his party were rushed from the Willard Hotel to the sub-basement maintenance area of the Australian Embassy in Washington D.C., President Bush was boarding Air Force One in Sarasota, Florida. The President had spent the morning visiting the Emma E. Booker Elementary School in Sarasota, Florida, where he had been reading *The Pet Goat* with second-grade school children to promote his proposed education bill.[234] With the United States under attack, Bush spent the next several hours on board Air Force One that took him to Barksdale Air Force Base in Louisiana, to the US Strategic Command Center in Offut, Nebraska, and eventually back to Washington D.C.[235] At 8.30 pm the President gave a nationally televised speech where he spoke for about five minutes. Although it was not clear who was responsible for the attacks, Bush already seemed to be certain about why the United States had been attacked. The President stated:

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[231] Department of Foreign Affairs & Trade, *Transnational Terrorism: The Threat to Australia*, 2004; [hereinafter "2004 White Paper"].
[232] Department of Prime Minister & Cabinet, *Protecting Australia Against Terrorism,* 2006; <http://cip.gmu.edu/archive/Australia_ProtectAUTerrorism_2006.pdf>.
[233] Department of Foreign Affairs & Trade, *Advancing the National Interest: Australia's Foreign and Trade Policy White Paper*, 2003; [hereinafter "2003 White Paper"].
[234] Dan Balz and Bob Woodward, "America's Chaotic Road to War – Bush's Global Strategy Began to Take Shape in First Frantic Hours after Attack," *Washington Post* (Washington), 27 January 2002, A01.
[235] Ibid.

> Today, our fellow citizens, our way of life, our very freedom came under attack in a series of deliberate and deadly terrorist acts. (...) America was targeted for attack because we're the brightest beacon for freedom and opportunity in the world. And no one will keep that light from shining.[236]

From the first, the President made it clear that the United States had been attacked for its virtuous qualities rather than its policy choices. This assertion continued to be the basis on which the Bush administration constructed the narrative of the "war on terrorism" for the months and years to come. Special care was to taken to ensure that the terrorist attacks could not be understood as anything but an unprovoked assault on an innocent and peaceful nation. The notion of victim-hood was developed further by the President in his address to Joint Session of Congress and the American people on 20 September 2001 when he stated:

> Americans are asking, why do they hate us? They hate what we see right here in this chamber - a democratically elected government. Their leaders are self-appointed. They hate our freedoms - our freedom of religion, our freedom of speech, our freedom to vote and assemble and disagree with each other.[237]

Two months later, President Bush made similar remarks. Speaking at a conference of US attorneys on 29 September 2001 he pointed out that:

> Our enemies are resourceful, and they are incredibly ruthless. They hide and they plot, and they target freedom. They can't stand what America stands for. It must bother them greatly to know we're such a free and wonderful place – a place where all religions can flourish; a place where women are free; a place where children can be educated. It must grate on them greatly.[238]

In addition to the assertion that the United States had been targeted for its virtues and values, Bush put forward a second, related argument as to why the terrorists chose to launch the attacks. According to the president, the reasons for the assault were to be found in the identity and nature of the terrorists and not in any concrete political grievances. America was targeted simply because the attackers were primitive, barbarian, intolerant and envious. The terrorists' motivations were rooted in their hatred of democracy and freedom as well as in anti-globalisation and anti-modernism.

By explaining the attacks with reference to the alleged character of the perpetrators, Bush appeared to be seeking to suppress any alternative interpretations of 9/11. In doing so, the President implicitly dismissed any possibility that the attacks could have been read in connection with American foreign

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[236] President George W. Bush, "Address to the Nation," 11 September 2001.
[237] President George W. Bush, "Address to Joint Session of Congress," 20 September 2001.
[238] President George W. Bush, "U.S. Attorneys on Front Line in War," Remarks by the President to U.S. Attorneys Conference, Presidential Hall, Dwight David Eisenhower Office Building, 29 November 2001.

policy. The 9/11 attacks were rather portrayed as being directed against the United States' longstanding traditions of freedom and democracy. As a consequence, all nations that shared the United States' democratic traditions and principles were under threat. The fight against terrorism was thus no longer an issue of concern for the United States alone; it was the fight of the civilized world at large. As Bush remarked about a week after the attacks on New York City and Washington:

> This is not, however, just America's fight. And what is at stake is not just America's freedom. This is the world's fight. This is civilization's fight. This is the fight of all who believe in progress and pluralism, tolerance and freedom.[239]

Developing the notion of the civilized world under attack also enabled the Bush administration to portray the fight against terrorism as a generational challenge of historic proportions. As the President remarked in a televised speech to the Warsaw Conference on Combating Terrorism on 6 November 2001:

> For more than 50 years, the peoples of your region suffered under repressive ideologies that tried to trample human dignity. Today, our freedom is threatened once again. Like the fascists and totalitarians before them, these terrorists - al Qaeda, the Taliban regime that supports them, and other terror groups across our world - try to impose their radical views through threats and violence. We see the same intolerance of dissent; the same mad, global ambitions; the same brutal determination to control every life and all of life.[240]

Two months after the "war on terror" had begun, President Bush had already compared the campaign with the defining struggles of the 20th century, namely, the fight against fascism and the Cold War. As Richard Jackson has pointed out, one of the consequences of these constructions, and most likely part of their intended function, was to de-historicise the 9/11 attacks from the recent past, while simultaneously imposing a radically different set of interpretations.[241] Drawing parallels between the threat of terrorism, on the one hand, and fascism and communism, on the other, Bush sought to remove all traces of more recent US foreign policy, including in particular the US military presence in Saudi Arabia and US policies in the Middle East. The purpose of this narrative was to divert attention from the fact that al-Qaeda had repeatedly attacked US interests for clearly defined political reasons.[242]

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[239] President George W. Bush, "Address to Joint Session of Congress," 20 September 2001.
[240] President George W. Bush, "Address to the Warsaw Conference on Combating Terrorism," 6 November 2001.
[241] Richard Jackson, *Writing the War on Terrorism* (Manchester: Manchester University Press, 2005) 58.
[242] E.g., attacks on the US embassies in Kenya and Tanzania in 1998 or attack on the USS Cole in 2000.

In combination with the president's attempts to reinforce the notion of innocent victim-hood, portraying the fight against terrorism as a struggle of historic proportions or "civilization's fight" was used as a key component to construct support for exceptional policy measures, both domestically and international. The president's explanations were essential for preparing the ground for the introduction of the USA Patriot Act as well as for ensuring public acceptance for the extra-judicial detention, interrogation and ill-treatment of terrorism suspects in Guantanamo Bay and elsewhere. Moreover, the rhetoric was indispensable in building public support for the military operations in Afghanistan, and ultimately, the invasion of Iraq.

In Canberra, the Howard government's interpretations of the 9/11, together with its portrayal of the challenges associated with the threat of international terrorism, perfectly replicated the narrative offered by the Bush administration in Washington. These replications not only contained the same metaphors and analogies but, at times, the very same wording President Bush used in his speeches following the 9/11 attacks. Invoking ANZUS Pact on 14 September 2001, Prime Minister Howard referred to 9/11 as "an attack upon the way of life we hold dear in common with the Americans."[243] Throughout his time as prime minister, this theme dominated Howard's statements on the nature and quality of the threat of terrorism. Speaking on national television in 2005, he declared, for instance:

> We are dealing with a group of fanatics who have no tolerance for our way of life, who will not be happy unless they have brought down our way of life and imposed their own. That's the dimension of the struggle. And don't, you know, misunderstand what their goal is. Their goal is the destruction of our kind of society.[244]

The Prime Minister employed similar rhetoric in his Australia Day address to the National Press Club in Canberra on 25 January 2006. He pointed out that:

> Terrorism remains the defining element in Australia's security environment. Australians and Australian interests continue to be a terrorist target, both abroad and at home. This tests our sense of balance no less than our resolve. We know what our enemies think and what they are capable of. They hate our freedoms and our way of life. They despise our democratic values. They have nothing but contempt for a diverse society which practises tolerance and respect.[245]

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[243] "Government Invokes ANZUS Treaty," Prime Minister's Press Conference, 14 September 2001.
[244] Transcript, Interview with the Prime Minister, Channel Nine, 24 April 2005 [on file with author].
[245] The Hon John Howard, MP, "Australia Day Address to the National Press Club," Canberra, 25 January 2006, <http://australianpolitics.com/news/2006/01/06-01-25_howard.shtml>.

As recently as July 2007, Howard reiterated that the threat posed by the "menace of Islamic fanaticism was real, constant and insidious."[246] Speaking at the Tasmanian Liberal Party conference, in Launceston, he continued to warn the nation to wake-up to the reality that terrorism was a "borderless assault" and a global threat to society and the carefree lifestyle that Australians cherish:

> Make no mistake, Islamic fanaticism hates the way of life we have. It is dedicated to the destruction not only of freedom of religion, but freedom of the way of life we believe in so strongly. Their enemy is the free way of life we hold dear, their weapons are unprecedented, they involve a borderless assault on the way of life and the beliefs we hold dear.[247]

Foreign Minister Alexander Downer, portrayed the threat of terrorism to Australia in similar terms. According to Downer, Al Qaeda and other terrorists pursued a "terrorist project of limitless ambition". Australia was therefore engaged in a "struggle to the death over values".[248] Islamic terrorist organisations, Downer pointed out, remained "convinced that their destiny [was] to overshadow the democratic West".[249] Indeed, the terrorists had embarked on a ruthless mission to "destroy our society by waging a version of total war".[250] The "islamo-fascists," continued Downer, "cannot achieve their aims through persuasion – only through fear and chaos. (...) Their precise goals and ideologies are so extreme – and their methods are so evil – that it is difficult for us to understand them."[251] Al Qaeda's intent was "genocidal and utterly uncoloured by reason, restraint, compassion or a notion of shared humanity".[252]

Attorney-General, Philip Ruddock, saw it in the same way. He declared that "the terrorists are driven by ideological obsession and a desire to destroy Western liberal democratic societies."[253] According to Ruddock, the terrorists wanted "to wage war against all those who do not conform to their perverted and corrupted view of Islam. All countries and people who value peace and freedom are terrorist targets."[254]

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[246] Quoted in Sue Neales, "Terrorism fight 'will last for decades'," *The Australian* (Sydney), 14 July 2007.
[247] Ibid.
[248] The Hon Alexander Downer, MP, "Transnational Terrorism: The Threat to Australia", Speech to launch the White Paper on International Terrorism, National Press Club, Canberra, 15 July 2004, <http://www.foreignminister.gov.au/speeches/2004/040715_tt.html>.
[249] Ibid.
[250] Ibid.
[251] Ibid.
[252] Ibid.
[253] Philip Ruddock, "International and Public Law Challenges for the Attorney-General," Address to the Law Faculty, Australian National University, Canberra, 8 June 2004, paragraphs 6-7, available at <http://law.anu.edu.au/cipl/Lectures&Seminars/04%20Ruddockspeech%208June.pdf>.
[254] Ibid.

Echoing the Bush Administration's rhetoric in remarkably similar terms, the Howard government portrayed the fight against terrorism as a struggle over values and a defence of Australia's way of life. The perpetrators of terrorist attacks were described as irrational, obsessed and ruthless, thus implying that the reasons for the terrorists' resort to violence were to be found in their personality and character rather than in any political grievances. In the vein of the Bush administration, the Howard government also chose to invoke the image of a civilisation under attack. Downer, for example, declared:

> The sad truth is that 9/11 did change the world we live in. We are engaged in a war to protect the very civilisation we have worked so hard to create – a civilisation founded on democracy, personal liberty, the rule of law, religious freedom and tolerance.[255]

Downer was quick to add that the terrorists' actions were unprovoked and unrelated to any American or government policy. Mirroring the terminology of Bush's statements of 11 September 2001 and 11 September 2002 in which the President declared that "the *resolve* of our great nation is being tested,"[256] the Foreign Minister portrayed the campaign against the threat of terrorism as the ultimate fight for survival:

> At the outset, we should be clear that this is a war that we did not choose. The terrorists have declared war on us because of who we are and what we value. Our only choice is whether or not we defend ourselves. The Government has made its decision: we will defend Australians, our nation and our interests. It is not an easy task – defending ourselves will *test our resolve*, our courage, our patience and our resources. But it is, surely, our *only* chance for peace and security.[257]

This exposé of statements by President Bush and by Prime Minister Howard and his Cabinet serves to demonstrate that the Australian government adopted the narrative on the fight against terrorism as offered by the White House following the attacks on New York and Washington on 9/11. Despite the fact that Australia – in contrast to the United States and other countries – had not experienced any terrorist attack on its soil since the 1978 Hilton bombing in Sydney, the Howard government portrayed terrorism as the supreme threat to Australia and its people. In doing so, the Government did not shy away from replicating the colourful rhetoric of the Bush Administration. Indeed, employing the exact same metaphors and images used by President Bush, the Howard government

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[255] The Hon Alexander Downer, MP, "Australia and the Threat of Global Terrorism – A Test of Resolve", Speech by the Australian Minister for Foreign Affairs to the National Press Club, Canberra 13 April 2004.
[256] "The resolve of our great nation is being tested. But make no mistake: We will show the world that we will pass this test. God bless." President George W. Bush, "Remarks upon Arrival at Barksdale Air Force Base," 11 September 2001. See also President George W. Bush, "Address to the Nation," 11 September 2002: "America has entered a great struggle that tests our strength, and even more our resolve."
[257] Downer, "Australia and the Threat of Global Terrorism," [emphasis added].

described the fight against terrorism as a generational and historical struggle, to save not only Australia but the entire Western civilization. The Government's assertions and arguments, many of which were repeated in policy papers and reports, will now be subject to closer examination.

2. The "West", "Western Values" and Australia's Geopolitical Significance

A central assertion in the statements by Howard and other cabinet ministers was the contention that Australia was a target for terrorist attacks because its values and its "way of life". This argument was not only put forward by Canberra politicians but also by senior intelligence officials. The Director-General of the Australian Security Intelligence Organisation (ASIO), Dennis Richardson, for example, declared that Australia was a "terrorist target for its values, not for its foreign policy."[258] Richardson acknowledged that "the fact that we are in close alliance with the United States, and that we were early and actively engaged in the war on terrorism, does contribute to us being a target." However, he thought this to be "very different from any claim that we are a target solely because of our alliance with the United States and our involvement in the war on terrorism." Richardson's successor, Paul O'Sullivan also invoked the "values" argument. Speaking in February 2007, he claimed that the terrorists' objective was to "destroy the people, values, and things we cherish."[259]

Given the prominence of the "values argument" in statements by the Prime Minister, members of his cabinet and senior intelligence officials, it is unsurprising that the argument also featured heavily in the Government's White Paper on Terrorism which was released in July 2004, nearly three years after the 9/11 attacks. The 2004 White Paper encapsulated the key arguments put forward by the Howard government as to why Australia was regarded as a target for terrorist attacks. As a consequence, the analysis in this chapter will specifically review some arguments as formulated in the White Paper.

The White Paper's first central argument is that Australia is a terrorist target because the "West" and "Western values" are perceived by the "transnational terrorist organisations" as impeding their political goals.[260] In the language of the White Paper, Australia's "Western values" – "our beliefs in democratic process, racial and gender equality, religious tolerance and equality of opportunity" –

[258] Dennis Richardson, "Australia is a terrorist target for its values, not for its foreign policy," *Sydney Morning Herald* (Sydney), 19 March 2004.
[259] Paul O'Sullivan, "National Security Intelligence and Counter-Terrorism", Australian National Security Conference 2007, Canberra, 27 February 2007.
[260] 2004 White Paper, 67.

"impede their political goals (...) *We are in their way.*"[261] This formulation draws heavily on the wording used by President Bush in his speech of 20 September 2001 in which he declared that "these terrorists kill not merely to end lives, but to disrupt and end a way of life. With every atrocity, they hope that America grows fearful, retreating from the world and forsaking our friends. They stand against us, *because we stand in their way*".[262]

The White Paper provides two examples of how this obstruction is perceived to occur. First, the "West" is "seen as standing in the way of their goal to transform the Muslim world into a Taliban-style society."[263] However, the White Paper provides little indication of how the "West" – or Australia for that matter – was seen to be impeding this goal, except referring in a preceding sentence that: "[w]eakening the influence of the West would advance their political goals by helping undermine those Muslims they view as corrupt and open to Western influence."[264] The proximity and configuration of these two statements suggest that the Australian government was proposing that "Western influence" in the Muslim world is seen by Al Qaeda and other terrorist organisations as hindering them from accomplishing their transformation project. This interpretation is also in line with statements made by Howard as well as Downer and Ruddock.

To an extent, this argument is supported by the wider literature. As Jason Burke and others have noted, a primary focus of Islamist terrorist organisations such as Al Qaeda are the so-called "apostate" regimes – those governments in the Muslim world that are seen as preventing the implementation of *sharia* and are alleged to have been corrupted by non-Muslim sources.[265] Historically, Islamist terrorist organisations sought to overthrow these regimes by attacking them directly. Nevertheless, these efforts proved to be largely ineffectual. After a prolonged period of failure, some proponents of political violence – Osama bin Laden being a prominent example – argued that the 'apostate' regimes owed their continued survival to the inordinate support they received from their "Western" backers. Consequently, these Islamist thinkers advocated a policy of attacking the perceived backers of the "apostate" regimes, in order to compel them to withdraw their support.[266]

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[261] Ibid, 67; [emphasis added].
[262] President George W. Bush, "Address to Joint Session of Congress," 20 September 2001; [emphasis added].
[263] The exact quote from the White Paper is that "we are seen as..." I have assumed that this "we" was a reference to the "West", given the context of the preceding sentence. It should also be noted that in an "Information Sheet" distributed with the White Paper, the Government adopts a different phrase to this one, namely: "We stand in the way of their ultimate goal which is to establish an *Islamic super-state*" [emphasis added]. However, an "Islamic super-state" and a "Taliban-style society" are not phrases that can be used interchangeably. This chapter, out of a desire not to confuse the reader, will only refer to the White Paper's "Taliban-style society."
[264] 2004 White Paper, 67.
[265] See Jason Burke, *Al Qaeda: Casting a Shadow of Terror* (London: I.B.Tauris, 2003) 147; and Rohan Gunaratna, *Inside Al Qaeda: Global Network of Terror* (Melbourne: Scribe Publications, 2002) 5.
[266] Ibid.

There also appears to be some support for the White Paper's notion that "transnational terrorist organisations" perceive "Western influence" to be impeding their goal of transforming the Muslim world. However, the White Paper's use of the term "Western influence" in the context of explaining why Australia is a target is misleading. First, it implies that the "West" as a coherent body is seen by the terrorist organisations as obstructing their transformation goals, and thus the "West" as a whole is likely to be a target. This is an erroneous suggestion. It is not the "West" that terrorist organisations see as hindering their transformation project, but very specific "Western" countries. The most obvious example in this regard is the United States, whose perceived meddling in Muslim countries is the focal point of nearly all Islamist terrorist organisations. Other major examples include the United Kingdom, and, to a lesser extent France and Germany.

Second, on a closely-related point, the White Paper's use of "Western influence" is misleading because it implies that, by association, "Australian influence" is, and is perceived as, impeding the goals of Islamist terrorist organisations. This suggestion, however, greatly exaggerates Australia's influence, especially in the Muslim world. For example, no Muslim government owes its continued existence to the largess of the Australian government (along the lines of the relationship between the House of Saud and America, and Egypt and America). In addition, Australia's business presence is smaller and arguably less resented than businesses from other "Western" countries; and Australia is an inconsequential propagator of Australian and/or "Western" culture. It is therefore difficult to imagine any Islamist terrorist organisations reaching the conclusion that Australia is standing in its way of transforming the "Muslim world into a Taliban-style society". Similarly, it is unclear to see how attacking Australia would provide Islamist terrorist organisations with the highest expected utility of achieving these transformation goals.

The second aspect of the argument is closely related and stipulates that terrorist organisations "feel threatened by our values and the place we take in the world. (...) Our conspicuous example of economic and social prosperity is deemed a threat to their cause. We hear our values and social fabric attacked."[267] This argument was also made in similar terms in the 2003 Foreign Affairs White Paper "Advancing the National Interest" which states that "terrorist groups such as al-Qaida and Jemaah Islamiyah attack our values and pervert the religion they purport to uphold."[268] However, neither White Paper makes it clear how Australian values impede the goals of Islamist terrorist organisations. Given the 2004 White Paper's earlier emphasis that transnational terrorist organisations "are confronted by the reality that it is not only people of the West who value such

[267] 2004 White Paper, xi.
[268] 2003 White Paper, 36.

freedoms,"[269] it can be assumed that the Howard government was claiming that Australia's Western values compete with the Islamist terrorist organisations prescriptions for Muslim society.

The causal relationship that this assertion is based on is dubious. The 2004 White Paper provides no plausible explanation of how attacking Australia – or any "Western" nation for that matter – will reduce the appeal of "Western values," or increase the appeal of Al Qaeda's ideology, in the Muslim world. Furthermore, even if one ignores the previous point, it is hard to imagine what effect attacking Australia would have on reducing the attractiveness of "Western" values. Terrorism relies heavily on symbolism, and there would be little symbolism in attacking Australia – at least with regard to reducing the appeal of "Western values". The White Paper's claims notwithstanding, Australia is simply not a prominent example of "Western values" or the "West" in general. Australia is not the most prosperous or populous "Western" nation; Australia has no historic claims to the development of "Western values"', similar to Greece, Italy, the United Kingdom or the United States; nor has Australia any prominent symbols of either the "West" or "Western values", such as the Statue of Liberty or Westminster. As previously argued, Australia is not a major propagator of "Western" culture. Nor does Australia have a colonial history in the Muslim world, and thus become the physical embodiment of the "West" in the eyes of former colonial subjects for example, as general Algerian attitudes towards the French, and Indonesian attitudes towards the Dutch.

More generally it is highly questionable whether "Western" values are seen as an impediment to the Islamist terrorist organisations at all. Indeed, public statements by Islamist terrorist organisations hardly ever cite democracy, freedom of speech or other "Western" political and cultural values and principles as among the reasons for launching terrorist attacks. As Peter Bergen, one of the few Western journalists who has actually interviewed Osama bin Laden personally, put it:

> In all the tens of thousand of words that bin Laden has uttered on the public record...he does not rail against the pernicious effects of Hollywood movies, or against Madonna's midriff, or against the pornography protected by the US Constitution...Bin Laden cares little about such cultural issues. What he condemns the United States for is simple: its policies in the Middle East....the continued US military presence in Arabia; US support for Israel; its continued bombing of Iraq; and its support for regimes such as Egypt and Saudi Arabia.[270]

None of the nine public statements reportedly made by Al Qaeda between 2001 and 2006 contains any reference to "Western" values or examples of "Western" economic and social prosperity. Instead, these statements explicitly cite US foreign policy in the Middle East and the presence of

[269] 2004 White Paper, 67.
[270] Peter L. Bergen, *Holy War Inc. - Inside the Secret World of Osama bin Laden* (New York: Free Press, 2001) 242.

US military personnel in the Arab world as key factors for resorting to violence. The Howard government's argument that Australia is a terrorist target because the "West" and "Western values" are perceived by terrorists as impeding their political goals was thus rather simplistic, misleading, and unsubstantiated. What is more, the argument greatly exaggerated Australia's geopolitical significance.

3. Australia as a Terrorist Target for "what it is rather than what it has done"

The second central argument offered by the Howard government was closely related to the "values argument," and stipulated that Australia was a target for terrorists "because of who we are rather than what we've done."[271] This notion was frequently advocated by both the Prime Minister and by the Foreign Minister. ASIO Director-General Richardson also stated that Australia was under threat "because we are who we are."[272] Likewise, the argument featured prominently in the 2004 White Paper which states that "the essence of their [the terrorist's] objections is not our actions. Rather, it is our example as a people and as a society and the values we stand for."[273]

There are several serious flaws with this line of reasoning. First, it is framed in a manner that suggests that the Howard government was advancing a political argument, rather than offering a genuine analysis of the reasons why Islamist terrorist organisations are opposed to Australia. It should be remembered that the "who we are rather than what we've done' thesis is not a sacrosanct objective truth, but merely the Government's *interpretation* of the Islamist terrorist organisations' underling motivations. This point should not be seen as an attempt to harangue this argument from a relativist perspective; rather, it is simply to highlight the limitations that prohibit a government from reaching objective conclusions about the motivations of its adversaries. These limitations, amongst others, include imperfect intelligence, adversarial counter-intelligence efforts, and analysis problems, like cultural differences, which may skew the examination of collected information and its interpretation. These and other limitations have hobbled the analysis of adversarial motivations by governments throughout history. This is, of course, not to say that governments should refrain from attempting to interpret the motivations of its adversaries because of these limitations. Though imperfect they may be, interpretations at least provide a guide for government policies and strategies. However, an interpretation of an adversary's motivations is only of any value if it is

[271] See, e.g., the Hon John Howard, MP, "Address at the National Remembrance Service honouring the victims of the terrorist attacks in Bali," 16 October 2003; see also "Govt argues against increased terror threat," *ABC News (Online)*, 16 March 2004<http://www.abc.net.au/worldtoday/content/2004/s1066853.htm>.
[272] Dennis Richardson, "Australia is a terrorist target for its values, not for its foreign policy," *Sydney Morning Herald* (Sydney), 9 March 2004.
[273] 2004 White Paper, 69.

recognised as an interpretation. Unfortunately, such recognition was not conveyed by pronouncements by the Howard government which instead projected an unrealistic air of certainty.

The certainty of the Howard government's assertion that Australia was a target for terrorist attacks "because of what it is rather than what it has done" can be construed in two ways – neither of which is attractive. First, it could have reflected rigidity within the Government regarding the motivations of the transnational terrorist organisations. If this is the case, then this rigidity was likely to hamper Australian counterterrorism efforts, by preventing the consideration of alternative explanations, and stifling the creativity and adaptiveness that is required in combating organisations such as Al Qaeda. Alternatively, the Government was projecting certainty in its statements and the White Paper because it was trying to advance a political argument, and thus was leaving little room for alternative explanations that could detract from its central point. This would have been the worst possible outcome of the two. It would have signified that the Government was intent on fighting political battles rather than seriously engaging with the security environment.

Further flaws within this line of reasoning become evident when the argument is broken down into its two parts, namely, that Australia was a target for terrorist attacks because of "what it is", and, secondly, that Australia's actions were irrelevant to it being a target. The first part of the assertion begs the question of what Australia actually is, and why its identity makes it a target for terrorist attacks. Is Australia a target because it is a country of around 21 million people, many of whom love watching or playing cricket, "footy," or enjoying a beer or two at a barbeque on a Sunday afternoon? Is it a target because English is the national language, because it has no state religion or because school attendance is compulsory between the ages of 6 and 16? Or is it a target because the country was ranked first in the 2008 Legatum Prosperity Index, third in the United Nations 2007 Human Development Index, or sixth in *The Economist's* worldwide Quality-of-Life Index for 2005?[274]

It appears that the Howard government was indeed suggesting that some of the above mentioned characteristics made Australia a target. The White Paper, for instance, claimed that terrorists felt threatened by Australia's example as a "conspicuously successful modern society."[275] In essence, this claim is thus akin to the assertion that Australia is a terrorist target for its "values" and its "way of life". However, as demonstrated earlier, this argument is unsubstantiated, flawed and misleading.

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[274] 2008 Legatum Prosperity Index, <http://www.prosperity.com/downloads/2008LegatumPItable.pdf>; United Nations 2007 Human Development Index, <http://hdr.undp.org/en/reports/global/hdr2007-2008/>; The Economist's worldwide Quality-of-Life Index for 2005, <http://www.economist.com/media/pdf/QUALITY_OF_LIFE.PDF>.
[275] 2004 White Paper, 67.

The second part of the assertion that Australia is a target for terrorist attacks "because of what it is rather than what it has done" stipulates that the government's policy choices are irrelevant to Australia being a target. This assertion is erroneous for factual reasons. It is also highly problematic as far as its policy implications are concerned. In particular, a government that is tempted to believe that since "what Australia does" is not the source of terrorist opposition, may conclude that its actions can be disconnected from further analysis of the terrorist threat. This mindset is considerably flawed because it ignores the importance of support to the emergence and persistence of terrorism campaigns. Terrorist organisations do not operate in a vacuum. They are heavily reliant on support from the broader community – for financial support, manpower, intelligence, refuge, and acquiescence. It is quite clear – something that the White Paper even recognised – that Australia's actions can have an impact on the levels of support that terrorist organisations command. So, even if one fully accepts that terrorist organisations oppose Australia because of "who we are rather than what we've done", this does not mean that the government does not have to worry about the effects its policy choices have on terrorism.

Theses policy considerations notwithstanding, it is simply incorrect to suggest that the actions of governments are irrelevant to a country's target profile. In fact, statements made by different terrorist organisations suggest that current terrorist campaigns have been precisely driven by perceived injustices of foreign policy, particularly US foreign policy. Speaking shortly after the 9/11 attacks, Osama Bin Laden, for instance, drew a direct connection between the attacks on New York and Washington and US foreign policy in the Middle East:

> I would like to touch on one important point in this address. The actions by these young men who destroyed the United States and launched the storm of planes against it have done a good deed. They transferred the battle into the US heartland. Let the United States know that with God's permission, the battle will continue to be waged on its territory until it leaves our lands, stops its support for the Jews, and lifts the unjust embargo on the Iraqi people who have lost more than one million children.[276]

In another Al Qaeda statement, bin Laden specifically pointed out that his motivation for pursuing terrorist violence were rooted in what he perceived to be unjust US and Israeli policies in Palestine and Lebanon. He declared:

> I say to you, Allah knows that it had never occurred to us to strike the towers. But after it became unbearable and we witnessed the oppression and tyranny of the American/Israeli coalition against our people in Palestine and Lebanon, it came to my mind. The events that affected my soul in a direct way started in 1982 when

[276] "In full: Al-Qaeda statement", *BBC News (Online)*, 10 October 2001, <http://news.bbc.co.uk/2/hi/middle_east/1590350.stm>.

> America permitted the Israelis to invade Lebanon and the American Sixth Fleet helped them in that. This bombardment began and many were killed and injured and others were terrorised and displaced.[277]

For bin Laden, past and present policies of the United States and Israel amounted to criminal acts for which the leaders in Washington, London and Jerusalem should be held responsible:

> The Al-Qaeda organization declares that Bush Senior, Bush Junior, Clinton, Blair and Sharon are the arch-criminals from among the Zionists and Crusaders who committed the most heinous actions and atrocities against the Muslim nation. They perpetrated murders, torture and displacement. Millions of Muslim men, women and children died without any fault of their own. Al-Qaeda stresses that the blood of those killed will not go to waste, God willing, until we punish these criminals.[278]

This rationale for resorting to terrorist violence was not only found in statements by bin Laden or Al Qaeda. On the contrary, other Islamist terrorist organisations and individuals have invoked similar justifications. During his trial, Imam Samudra, one of the key perpetrators of the 2002 Bali bombings, sought to justify his actions by referring to the policies by the United States and its allies towards Afghanistan and Iraq the as well as interrogations techniques employed in the "War on Terror": He declared:

> For all you Christian infidels, if you say that this killing was barbaric and cruel, and happened to innocent civilians from your countries, then you should know that you do crueller things than that. Do you think that 600,000 babies in Iraq, and half a million Afghan children and their mothers are soldiers and sinful people who should have to endure the thousands of tonnes of your bombs? As long as you regard our brothers and sisters as terrorists and torture them in your prisons, there will continue to be casualties from your countries, wherever they may be.[279]

Indeed, eleven out of the thirteen reasons Imam Samudra gave for launching the Bali bombings contained specific references to the foreign policies of the United States and other allied countries, including Australia.[280] Similar views were also advanced by the perpetrators of the London tube

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[277] "Full transcript of bin Ladin's speech," *Scoop News* (New Zealand), 2 November 2004; <http://www.scoop.co.nz/stories/WO0411/S00034.htm>. "Let us investigate whether this war against Afghanistan that broke out a few days ago is a single and unique one or if it is a link to a long series of crusader wars against the Islamic world. Following World War I, which ended more than 83 years ago, the whole Islamic world fell under the crusader banner – under the British, French, and Italian governments. They divided the whole world, and Palestine was occupied by the British. Since then, and for more than 83 years, our brothers, sons, and sisters in Palestine have been badly tortured. Hundreds of thousands of them have been killed, and hundreds of thousands of them have been imprisoned or maimed." Ibid.

[278] "In full: Al-Qaeda statement", *BBC News (Online)*, 10 October 2001.

[279] Quoted in ABC, TV Program Transcript Four Corners, "The Bali Confessions," 10 February 2003, <http://www.abc.net.au/4corners/content/2003/transcripts/s780910.htm>.

[280] According to transcripts of Samudra's confession on 29 Sept 2002, he gave 13 reasons for attacking Bali:

1) To oppose the barbarity of the US army of the Cross and its allies (England, Australia, Germany, France, Japan, Orthodox Russians, and others).

bombings of 7 July 2005. These attacks appear to have been largely motivated by concerns over British foreign policy and the perception that it was deliberately anti-Muslim. As Mohammad Sidique Khan, of the four suicide bombers, explained in his martyrdom video which was broadcasted by Al Jazeera Television on 1 September 2005:

> And our words have no impact upon you, therefore I'm going to talk to you in a language that you understand. Our words are dead until we give them life with our blood (...) Your democratically-elected governments continuously perpetuate atrocities against my people all over the world. And your support of them makes you directly responsible, just as I am directly responsible for protecting and avenging my Muslim brothers and sisters. Until we feel security, you will be our targets. And until you stop the bombing, gassing, imprisonment and torture of my people we will not stop this fight. We are at war and I am a soldier. Now you too will taste the reality of this situation.[281]

The war in Iraq and the role of the British government also played a significant role in the decision of Bilal Abdulla and Kafeel Ahmed to launch a (failed) car bomb attack on the Tiger Tiger night club in London's West End and the subsequent attempt to drive a Jeep Cherokee into an airport terminal in Glasgow in June 2007.[282] Abdulla, a British-born Iraqi medical doctor who was sentenced to 32 years in prison in December 2008, described the inability of doctors to treat childhood leukaemia caused by depleted uranium shells in Iraq, for instance, as one of the factors for his growing disgust of the British government. Asked how he felt when he heard British

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2) It was my obligation as a Moslem to take revenge for the pain of 200,000 weak men, weak women and babies who died without sin when thousands of tonnes of bombs were dropped in Afghanistan in September 2001, during Ramadan in the Islamic year 1422, to be precise.
3) Because Australia had taken part in efforts to separate East Timor from Indonesia, which was all an international conspiracy by followers of the Cross.
4) Troops of the Cross, working with infidel Hindu troops in India, had slaughtered Moslems in Kashmir.
5) Revenge for the barbarity and involvement of troops of the Cross in the Muslim Cleansing scenario in Ambon, Poso, Halmahera, and so on.
6) Defence of Bosnian Moslems who were slaughtered by troops of the Cross.
7) To carry out my responsibility to wage a global jihad against Jews and Christians throughout the world ([in] Moslem States).
8) As a manifestation of Islamic solidarity between Moslems, which is not limited by geographic boundaries.
9) To carry out Allah's order in the Book of An-nisa, verses 74-76, which concerns the obligation to defend weak men, weak women, and innocent babies, who are always the targets of the barbarous actions of the American terrorists and their allies.
10) As a strong warning to Jews and Christians, led by the American infidels, who occupy and defile two Islamic holy lands, places where the Prophet received the word of Allah.
11) So that the American terrorists and their allies understand that the blood of Moslems is expensive and valuable; and cannot be - is forbidden to be - toyed with and made a target of American terrorists and their allies.
12) So that the terrorists [hand-written addition - America and their allies] understand how painful it is to lose mothers, husbands, children, or other family members, which is what they have so arbitrarily inflicted on Moslems throughout the world.
13) To prove to Allah - the Almighty and most deserving of praise - that we will do whatever we can to defend weak Moslems, and to wage war against the US imperialists and their allies.

[281] "London bomber: Text in full," *BBC News (Online)*, 1 September 2005, <http://news.bbc.co.uk/1/hi/uk/4206800.stm>.
[282] "Blazing car crashes into airport," *BBC News (Online)*, 30 June 2007, <http://news.bbc.co.uk/2/hi/uk_news/scotland/6257194.stm>.

politicians seeking to justify sanctions on Iraq, he said: "It made me hate the Government, it made me hate the administration of this country [the United Kingdom]."[283]

The different statements of perpetrators of terrorist violence demonstrate that the actions by governments are unambiguously linked to a country's profile as a terrorist target. Yet, the Howard government disregarded these statements and claimed that Australia was a terrorist target for "what it is rather than for what it has done." It replicated the narrative offered by the Bush administration which sought to portray the 9/11 attacks as an unprovoked assault on an innocent and peaceful nation that lacked any connection to foreign policy. However, as with the Bush administration's argument, the claim that a country is a target for terrorist for "what it is", and irrespective of its policy choices, is equally flawed in the Australian context. Indeed, the claim appears to be based on political considerations rather than the result of an in-depth analysis of the underlying motivations of Islamist terrorist organisations.

4. Public Statements by Terrorist Groups Mentioning Australia as a Possible Target

Another central argument put forward by the Howard government as to why Australia was a target for terrorist attacks was that terrorist organisations and militants explicitly referred to Australia in a number of public statements. Both the Prime Minister and other Cabinet ministers repeatedly pointed to the fact that Al Qaeda and other terrorist organisations occasionally mentioned Australia as possible target for terrorist attacks.[284] Specifically, the Howard government's assumption that Australia was a terrorist target was mainly based on a number of statements allegedly made by bin Laden. In these statements, bin Laden referred to Australia in the context of the separation of East Timor from Indonesia,[285] the military operations in Afghanistan,[286] the Bali bombings of 2002,[287]

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[283] Cahal Milmo, "The Doctor Who Bombed Britain," *The Independent* (London), 17 December 2008.

[284] See, e.g., ABC, TV Program Transcript 7.30 Report, "Howard unfazed by split on terror risk," 15 March 2004; <http://www.abc.net.au/7.30/content/2004/s1066442.htm>.

[285] "The Crusader Australian forces were on the Indonesia shores ... they landed to separate East Timor, which is part of the Islamic world," quoted in 2004 White Paper, 66.

[286] "In this fighting between Islam and the crusaders, we will continue our jihad. We will incite the nation for Jihad until we meet God and get his blessing. Any country that supports the Jews can only blame itself. If Sheik Suleiman Abu Gheith spoke specifically about America and Britain, this is only an example to give other countries the chance to review their books. What do Japan or Australia or Germany have to do with this war [in Afghanistan]? They just support the infidels and the crusaders. This is a recurring war. The original crusade brought Richard [the Lionhearted] from Britain, Louis from France, and Barbarus from Germany. Today the crusading countries rushed as soon as Bush raised the cross. They accepted the rule of the cross." <http://www.jihadunspun.com/BinLadensNetwork/interviews/aljazeera10-21-2001-3.html>.

[287] In an audio statement broadcasted on the Arabic television network al-Jazeera on 12 November 2002, bin Laden pointed out that Al Qaeda had "warned Australia before not to join in [the war] in Afghanistan, and [against] its despicable effort to separate East Timor. It ignored the warning until it woke up to the sounds of explosions in Bali." Quoted in ASIO, *Report to Parliament 2002-03*, 33.

the situation in Palestine,[288] and the 2003 invasion of Iraq.[289]

The argument that Australia was a terrorist target because it was named in statements by bin Laden and other militants also featured prominently in the 2004 White Paper and in several ASIO Reports to Parliament. The White Paper, for instance, stated:

> Before 11 September 2001, Usama Bin Laden referred to the United States and its allies, mentioning Israel and the United Kingdom by name. Since then, he has more clearly identified those countries he considers to be 'allies'. Australia has been referred to in six separate statements issued by Bin Laden himself or his deputy, Ayman al-Zawahiri.[290]

The ASIO Reports to Parliament contain similar paragraphs. The ASIO Report to Parliament 2004-05 found that:

> It is clear that attacks on Australian interests here and abroad have been part of al Qa'ida's strategic vision for some years. Numerous statements by Usama bin Laden, his deputy Ayman al-Zawahiri, Abu Mus'ab al-Zarqawi in Iraq and Abu Bakar Ba'asyir in Indonesia have specifically mentioned Australia.[291]

The theme was repeated in the ASIO Report to Parliament 2005-06:

> Public statements by al-Qa'ida leaders and others have singled out Australia for criticism and encouraged attacks against us since 2001. In 2005-2006 statements issued by senior al-Qa'ida members, including Usama bin Laden, Ayman al-Zawahiri and the now deceased Abu Mus'ab al-Zarqawi, did not specifically mention Australia but they continued to threaten attacks on allies of the United States.[292]

The significance of public statements of bin Laden, Al Qaeda and other terrorist organisations is controversial. It is certainly prudent for a government to take such statements seriously. However, on the other hand, one must not overestimate the importance of these communiqués and internet warnings. In many cases is nearly impossible to establish with any degree of certainty whether or not these statements are in fact authentic. Even in cases where statements are believed to be authentic, it is still essential to recognise the divide between intent and capability of terrorist

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[288] "What has Australia in the extreme south got to do with the oppression of our brothers in Afghanistan and Palestine?" quoted in 2004 White Paper, 66.

[289] "We maintain our right to reply, at the appropriate time and place, to all the states that are taking part in this unjust war, particularly Britain, Spain, Australia, Poland, Japan and Italy;" quoted by Jamie Miyazaki, "Japan, Korea New Terror Fronts", *Asia Times Online*, 22 November 2003; <http://www.atimes.com/atimes/Japan/EK22Dh01.html>.

[290] 2004 White Paper, 65. Similarly, the ASIO Report 2003-2004 states that "between the 11 September 2001 attacks and 30 June 2004, Australia was specifically named in five public statements by Usama bin Laden and one by his deputy and mentor, Ayman al-Zawahiri. Australia was also mentioned in media and Internet statements by other Islamist extremists;" ASIO, *Report to Parliament 2002-03*, 17.

[291] ASIO, *Report to Parliament 2004-05*, 15.

[292] ASIO, *Report to Parliament 2005-06*, 19.

organisations or militants. Just because a terrorist organisation indicates that it is willing to launch attacks, does not automatically mean that it is also capable to do so. Indeed, issuing statements may have various reasons or purposes. Terrorist organisations may deliberately issue warnings as a tactical measure to provoke public discomfort. They may issue statements to pressure governments politically, perhaps even with a view to hoping to influence foreign policy decisions.

As far as the reference to Australia in public statements by militants is concerned, it is important to note that Australia has hardly ever been listed as a target in its own right.[293] Indeed, Australia was usually named alongside other nations, most notably Britain, France, Italy, Germany, Russia, Canada, Japan and others. At times, the listing of countries in statements of terrorist organisations appeared to be random or subject to confusion. In 2003, for instance, Norway, a country not usually regarded as a suitable target, was named on an Al Qaeda "hit list".[294] In this case, the listing appears to have occurred by accident and supposedly in lieu of a warning directed at Denmark for its support of the US invasion of Iraq. Australia's listings have most likely not been accidental. However, at the same time the listings may not be quite as significant as the Government sought the public to believe.

5. Terrorist Attacks Abroad as a Manifestation of the Terrorist Threat to Australia

A further feature in the Howard government's public assessment of the terrorist threat was the blurring of the distinction between the terrorist threat to Australian interests abroad and the terrorist threat at home. In several instances, terrorist attacks abroad have been invoked as manifestation of the threat to Australia itself. In particular the Bali bombings of 12 October 2002 were repeatedly cited as evidence that the threat of terrorism had reached Australia. Attorney-General Philip Ruddock, for example, stated that "we have had tragically Australians die in Bali, we've had the attack on our mission [in Jakarta], we've had the aborted attack in Singapore, we are clearly a target."[295] Prime Minister Howard, for instance, expressed the view that an attack on Australian soil seemed more likely since the Bali bombings. "It can happen here. We are more at risk than we were," he said.[296]

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[293] It is also open to discussion whether any of the statements issued by bin Laden, for instance, contained any direct threats to Australia. In these statements, Australia rather criticised for supporting US policies but did not explicitly encourage attacks on Australian soil.

[294] "Threat unsettles Norway's press," *BBC News (Online)*, 22 May 2003, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/3050677.stm>.

[295] "Australia is a terrorist target: Ruddock," *ABC News (Online)*, 3 September 2006, <http://www.abc.net.au/news/newsitems/200609/s1731641.htm>.

[296] "Australians want answers to Bali attack," *BBC News (Online)*, 15 October 2004, <http://news.bbc.co.uk/2/hi/asia-pacific/2329303.stm>.

The 2004 White Paper was also drafted in manner that allowed for a conclusion that the Bali bombings constituted evidence of a heightened threat to Australia itself. Both the structure of the relevant paragraphs and their grammatical construction can be interpreted as a suggestion that there was direct link between the Bali bombings and the threat to Australia. This is most evident in the section of the White Paper dealing with the "Threat to Australia and Australia's Interests".[297] This section opens with two short paragraphs entitled "Australia – a terrorist target" and "Why are we a target?"[298] These paragraphs are followed by a large highlighted textbox on the Bali bombings.

In addition to structural arrangements, the wording used in the White Paper also suggested a connection between the Bali bombings and the terrorist threat in Australia. The White Paper claimed, for example, that "the Bali attack on 12 October 2002 *brought home* to Australia the global reach of terrorism.[299] The White Paper further portrayed the Bali bombings as the Australian equivalent to 9/11 but failed to acknowledge that the attacks had not taken place on Australian soil:

> Transnational terrorism presents Australia with a challenge previously unknown. Its aims are global and uncompromising: to fight its enemies wherever it is able, and ultimately to establish a pan-Muslim super-state. Its battlefield is also global. And it strives, where it can, for large scale, maximum casualty impact. We saw this on 11 September 2001. We felt it a year later in Bali.[300]

This narrative was not only adopted by the political leaders in Canberra but also by ASIO and the Australian Federal Police (AFP). The ASIO Report to Parliament 2003-2004, for example, replicated Government rhetoric by stipulating that the fact that "Australia (was) a terrorist target was *brought home* by (...) the attack on the Australian Embassy in Jakarta on 9 September 2004."[301] Similarly, the AFP website, for instance, proclaimed that "the attacks in Bali made it clear to Australia that we could be a target of a major terrorist incident - something most Australians would previously have dismissed.[302]

The blurring of the distinction between the terrorist threat to Australian interests abroad and the terrorist threat at home, however, was not limited the examples of the Bali bombings and the bomb attack outside the Australian embassy in Jakarta. The ASIO Report to Parliament 2005-06, for instance, stated that "it is *clear* [that] Islamic extremists see Australian interests around the world

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[297] 2004 White Paper, 66.
[298] Ibid, 66-7.
[299] Ibid, 52.
[300] Ibid, vii.
[301] ASIO, *Report to Parliament 2003-04*, 3 [emphasis added].
[302] Australian Federal Police, "Fighting Terrorism in Australia," <http://www.afp.gov.au/national/fighting_terrorism.html>.

and Australia itself as targets for terrorist attacks.[303] As evidence supporting the "clear" assertion that *Australia itself* was regarded as a target for terrorist attacks the report listed the Australian citizen killed in the London tube bombings of 7 July 2005, the four Australians killed in the Bali beach bombings of 1 October 2005, the two Australians injured in a triple bomb attack in the Egyptian resort town of Dahab on 24 April 2006, and the Australian security guard killed in a roadside bomb blast in Iraq on 8 June 2006.[304] Yet, none of these incidents took place on Australian soil. Furthermore, it is questionable whether any of these attacks were in fact intentionally directed against Australians.

It remains open to debate whether the Howard government deliberately sought to blur the distinction between the terrorist threat to Australia and the threat to Australian interests abroad to compensate for the lack of any terrorist incident on Australian soil, or whether the Government's statements and reports were simply poorly drafted. What is clear, however, is that several statements allowed for an interpretation to the extent that terrorist incidents abroad needed to be taken as evidence of a clear threat to Australia itself. The 2002 Bali bombings were particularly instrumentalised in this regard. Such a narrative had the potential for political advantages for the Howard government as it strengthened, *inter alia*, the case for exceptional domestic counter-terrorism measures back home. As a consequence, it was politically convenient to refrain from making a clear distinction between the terrorist threat Australia at home and the threat to Australian interests abroad.

6. Australia's Geographical Isolation

A further argument advanced by the Howard government was that Australia's geographical isolation no longer provided any protection from the threat of terrorism. This argument was presented in both implicitly and explicitly. Shortly after 9/11, for instance, Prime Minister Howard took the view that "Australia had no way to be certain terrorists or people with terrorist links were not among asylum seekers trying to enter the country by boat from Indonesia."[305] This claim, however, was subsequently discounted by most commentators including senior officials of the intelligence community. ASIO's Director-General Dennis Richardson, for example, confirmed in a 2002 hearing of the Parliamentary Joint Committee on ASIO, ASIS, and DSD that there had not

[303] ASIO, *Report to Parliament 2005-06*, 18.
[304] Ibid.
[305] Dennis Atkins, "PM links terror to asylum seekers," *The Courier Mail* (Brisbane), 7 November 2001.

been any occasion on which the new antiterrorism legislation (provisions of the ASIO Act) could have been invoked to detain or question asylum seekers seeking residence in Australia.[306]

The 2004 White Paper on Terrorism explicitly discussed Australia's geographical location in the context of its assessment of the threat of terrorism. In particular, it makes two assertions about Australia's geographical isolation in relation to the threat of international terrorism. First it claims that Australia's "geography is no defence" and that "the protection once afforded by the so-called 'Sea-Air Gap' no longer exists."[307] Second, it asserts that "terrorists do not necessarily need to enter Australia in order to launch an attack against our territory or our interests."[308] The White Paper does not offer any satisfactory explanations to back up either claim. The only argument provided to discount the significance of Australia's geographical isolation is that "globalisation means we are within easier reach."[309] As far as the second geography-related claim is concerned, no explanation is given at all. In particular, the White Paper does not clarify how terrorists could possibly launch terrorist attacks against Australia's homeland from abroad.

The White Paper correctly states that in the past, Australia had been geographically insulated from areas that were a focus of terrorism, including the Middle East, North Africa and parts of Europe. It argues that this geographical isolation helped protect the country from the terrorist threat.[310] However, the White Paper fails to explain why terrorist attacks like those of September 11 and Bali provided any compelling evidence that the protection afforded by Australia's geography no longer exists. Indeed, it appears that Australia's geographical isolation continues to be a major factor for the low risk of a large-scale terrorist incident occurring on Australian soil.

Australia continues to enjoy significant protection through the so-called "sea-air gap." This is a fundamental difference to Europe, for instance, where thousands of people, cars and trucks pass borders unchecked each day. Human trafficking and illicit arms transfers from both Northern Africa and Eastern Europe are major security concerns for key continental countries like France, Spain, Italy and Germany. There is evidence to suggest, for example, that several perpetrators of the 2004 Madrid bombings illegally entered Spain from Morocco's north coast which is just a short ferry ride away across the Strait of Gibraltar.[311] Many members of these terrorist cells spoke perfect Spanish

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[306] Parliamentary Joint Committee on ASIO, ASIS and DSD, Review of the ASIO Legislation Amendment (Terrorism) Bill 2002, Official Committee Hansard, 30 April 2002, 26.
[307] 2004 White Paper, 72.
[308] Ibid.
[309] Ibid.
[310] Ibid.
[311] "Spain names 'bomb suspect' group", *BBC News (Online)*, 30 March 2004, available at <http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/europe/3583113.stm>.

and were able to slip easily in and out of Spain. Because of its geographical isolation, however, Australia does not have any similar problems.

The White Paper's second geography-related claim is that terrorists do not necessarily need to enter Australia in order to launch an attack against its homeland or its interests abroad.[312] As far as Australian interests overseas are concerned, it is plausible to argue that the threat of attacks has increased since the rise of violent extremism in the region. Indeed, terrorists may regard Australian diplomatic missions and business interests in Indonesia and elsewhere as legitimate targets in their struggle for the establishment of a unified Islamic state or "caliphate". However, it is difficult to see how terrorists could possible launch attacks against Australia's mainland from abroad. For an aerial attack to occur from "abroad", terrorists would require missiles or hijacked planes. Aircrafts would have to be hijacked in a different country and flown large distances to Australia. Attacks from the sea appear to be equally unlikely. Ships would have to be sailed to Australia and escape detection by Australian boarder control. Releasing a report on the terrorism threat to Australia's shipping and port infrastructure in April 2004, ASIO thus also concluded that the threat to the shipping and port facilities was "low" or "very low."[313] The Howard government's argument that Australia's geographical isolation did no longer provide any protection from the threat of terrorism was thus inaccurate and unsubstantiated.

III. Conclusion

The Howard government's public assessment of the threat of terrorism was flawed, misleading, and subject to a range of considerable misunderstandings and exaggerations. The Government did not, on the basis of deductive reasoning, demonstrate that Australia was a target for terrorist attacks, nor did it adequately address or frame the nature and quality of the terrorism threat to Australia. Instead, it offered a narrative that drew heavily on the "war on terrorism" rhetoric of the Bush administration in Washington, both as far as content and metaphors were concerned. In particular, the Government adopted the view that Australia was a target for its "values" and for "what it is rather than for what it has done". However, both claims were problematic and seemingly disregarded the pronouncements of terrorist organisations. They also displayed an exaggerated understanding of Australia's importance on the international stage, both as a "Western" nation and in its own right.

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[312] 2004 White Paper, 72.

[313] The Hon John Anderson, MP, Minister for Transport and Regional Services, "Release of Maritime Threat Assessment: Australia's shipping and port infrastructure," *Media Release*, 30 April 2004.

A further argument put forward by the Howard government was the assertion that Australia was a target for attacks because it had been named in several public statements of militants and terrorist organisations. While it was sensible to pay attention to such pronouncements, the Government failed to acknowledge that they may have been issued for political reasons and to provoke public discomfort. Equally problematic, the Government failed to make clear that there is a fundamental difference between the terrorism threat to Australian interests abroad and the threat to Australia itself. Several of its statements gave the impression that terrorist attacks abroad were to be taken as evidence of a heightened threat to Australia's homeland. Finally, the Howard government claimed that Australia's geographical isolation no longer provided any protection from the threat of terrorism. Yet again, the Government failed to provide any satisfactory explanation to justify its claim.

4

SECURITY, INTERNATIONAL TERRORISM AND THE THREAT TO AUSTRALIA

I. Introduction

II. Security and the Threat of International Terrorism

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2. The Source of the Threat of Contemporary International Terrorism

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IV. Implications for Counterterrorism Law and Policy

I. Introduction

It has already been argued in this thesis that the Howard government's account of the threat of international terrorism was fundamentally flawed and subject to range of misunderstandings. As a consequence, the aim of this chapter is to re-examine the threat that terrorism poses to Australia. Given that terrorism has been portrayed by the federal government and others as a defining threat to Australian "security", this Chapter will begin by questioning the suitability of the concept of security as a tool for meaningful analysis of counter-terrorism law and policy. It will argue that any analysis of counter-terrorism law and policy needs to start by identifying the source and target of the threat in question.

While the threat of international terrorism may be complex, it is suggested that for analytical reasons, it is fitting to classify the threat into three categories: the threat posed by the core leadership of Al Qaeda, the threat from regional militant organisations and groups that feed off localised grievances, and the threat posed by so-called home-grown terrorists. Having identified the source of the threat, the chapter will then examine its potential targets. In particular it will assess how Western democracies are threatened by terrorism. The chapter will argue that international terrorism does not pose an existential or even major objective threat to the stability of state or its key national interests but that it may have significant implications as far as the subjective perception of the threat is concerned.

These findings are then applied to the Australian case. It will be argued that terrorism poses a negligible objective threat to Australia and its interests but that the public perception of the threat needs to be taken into account in the formulation of national counter-terrorism law and policy. However, given that the terrorism threat is objectively low, policy measures addressing the threat must be carefully designed to meet the requirements of proportionality and potential effectiveness.

II. Security and the Threat of International Terrorism

1. The Problem of Defining Security

The term "security" has been widely used in the political and academic discourse on international terrorism. In Australia, too, government officials and commentators have described "terrorism" as

the definitive threat to Australian "security" or "national security".[314] Both terms have been employed to justify anti-terrorism legislation and feature in the title of several anti-terrorism laws.[315] Yet, in spite of the numerous references to the threat to "security" posed by international terrorism, a satisfactory definition of the term has rarely been offered. This is hardly surprising given that like the term "terrorism", the terms "security" and "national security" defy precise definition and have long been subject to extensive debate.[316] Scholars like Charles Schultze have argued, for instance, that "the concept of national security does not lend itself to neat and precise formulation" as it "deals with a wide variety of risks about whose probabilities we have little knowledge and of contingencies whose nature we can only dimly perceive."[317] Similarly, Mariana Valverde has questioned the suitability of the concept of security as a tool for meaningful analysis noting that "security is not something we can have more or less of, because it is not a thing at all." [318] According to Valverde, security "is the name we use for a temporally extended state of affairs characterized by the calculability and predictability of the future."[319]

Notwithstanding these challenges several scholars have attempted to formulate clear definitions of "security". Frank Trager and Frank Simonie, for instance, have described "national security" as "that part of government policy having as its objective the creation of national and international political conditions favourable to the protection or extension of vital national values against existing and potential adversaries."[320] Similarly, Richard Ullman has defined a threat to national security as "an action or sequence of events that (1) threatens drastically and over a relatively brief span of time to degrade the quality of like for the inhabitants of a state, or (2) threatens significantly to narrow the range of policy choices available to the government of a state or to private, nongovernmental entities (persons, groups, corporations) within the state."[321] The existence or absence of certain threats has also been central to other definitional attempts. Arnold Wolfers described security as "the absence of threats to acquired values."[322] Likewise, David Baldwin has

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[314] The Hon John Howard, MP, "Australia Day Address to the National Press Club," Canberra, 25 January 2006, <http://australianpolitics.com/news/2006/01/06-01-25_howard.shtml>.
[315] See, e.g., *Security Legislation Amendment (Terrorism) Act 2002* (Cth).
[316] For a comprehensive analysis of the semantics and history of "security", see, e.g., Lucia Zedner, *Security* (London: Routledge, 2009).
[317] Charles L. Schultze, "The Economic Content of National Security Policy," *Foreign Affairs* 51, no. 3 (1973): 529.
[318] Mariana Valverde, "Governing Security, Governing Through Security," in Ronald J. Daniels, Patrick Macklem and Kent Roach (eds.), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) 85.
[319] Ibid. Lawrence Freedman has also referred to security as an "inherently relational concept", see Lawrence Freedman, "The Concept of Security," in Mary Hawkesworth and Maurice Kogan (ed.), *Encyclopedia of Government and Politics* (London: Routledge, 2003) 752-61.
[320] Frank N. Trager and Frank L. Simonie, "An Introduction to the Study of National Security,'" in Frank N. Traeger and P.S. Kronenberg, *National Security and American Society* (Lawrence, KA: University Press of Kansas, 1973), 36.
[321] Richard H. Ullman, "Refining Security," *International Security* 8, no. 1 (1983): 133.
[322] Arnold Wolfers, ''National Security' as an Ambiguous Symbol', *Political Science Quarterly* 67, no. 4 (1952) 485.

characterised security as "a low probability of damage to acquired values."[323] He argued that the term must be defined in reference to "the actor whose values are to be secured, the values concerned, the degree of security, the kinds of threats, the means for coping with such threats, the costs of doing so, and the relevant time period."[324]

These definitions provide helpful indicators and illustrations that assist in understanding the concept of security. However, they remain too imprecise and vague as to serve as a tool for rigorous analysis. As Barry Buzan has pointed out:

> Definitions national security do a useful service in pointing out some of the criteria for national security, particularly the centrality of values, the timing of threats and the political nature of security as an objective of the state. But they can do a disservice by giving the concept an appearance of firmness which it does not merit.[325]

Accordingly, scholars like Buzan and Ole Waever suggested recognising "security" as a way of framing and responding to social problems. Waever has argued, for instance, that "we can regard security as a speech act (...). By uttering 'security', a state representative moves a particular development into a specific area, and thereby claims a special right to use whatever means are necessary to block it."[326] Similarly, Buzan has noted, the use of the term "security" is "a useful way both of signalling danger and setting priority."[327] In a November 2008 interview he argued that this is exactly what has happened in the case of international terrorism in the aftermath of 9/11:

> The war on terrorism (...) is bidding to be a macro-securitization – like the Cold War was. In other words, something which defines a very big strategic domain over a long period of time and which becomes the basic priority-setter in the security agenda. Obviously, that's the way Washington is looking at it at the moment, and that has been reasonably successful, in the sense that amongst the Western states at least - and quite a few others - there's a willingness to agree that there is a serious threat there and to proceed on that basis in policy terms. Contrast that with Iraq, with this huge disagreement.[328]

While "security" may be a suitable concept for setting policy priorities, the term's analytical value is further diminished by its inherent multi-dimensionality. For example, the state of security may

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[323] David A. Baldwin, "The Concept of Security," *Review of International Studies* 23, no. 1 (1997): 13.
[324] Ibid.
[325] Barry Buzan, *People, States and Fear* (New York: Harvester Wheatsheaf, 2nd ed. 1991) 18.
[326] Ole Waever, "Securitization and Desecuritization," in Ronnie D. Lipschutz (ed.), *On Security* (New York: Columbia University Press, 1995), 54-5.
[327] Barry Buzan, "Environment as a Security Issue," in Paul Painchaud (ed.), *Geopolitical Perspectives on Environmental Security* (Quebec: Cahier du GERPE Universite Laval, 2005) 1; Barry Buzan, Ole Waever and Jaap de Wilde, *Security: A New Framework for Analysis*, (London: Lynne Rienner, 1998).
[328] Foreign Affairs and International Trade Candana, *Interview with Barry Buzan, Professor of International Relations at the London School of Economics*, <http://www.international.gc.ca/cip-pic/discussions/security-securite/video/buzan.aspx?lang=eng>.

refer to quite distinct objective and subjective conditions. As Lucia Zedner has noted, the objective state of absolute security implies a condition of being without threat, which, even if it could be achieved today, is always called into question by the emergence of new threats tomorrow.[329] As a subjective condition, security is used to describe the "subjective sense we have of our own safety."[330] This subjective dimension of security can itself have several facets. It can take the form of either an absolute condition of feeling safe or, alternatively, it can manifest itself as a qualified condition of freedom from threats because feelings of insecurity have been allayed.[331] Moreover, as Christian Enemark has pointed out, the way "security" is perceived depends heavily on subjective interpretation and can hardly be classified as a positive or negative value.[332] Enemark has illustrated this point by arguing, for example, that "from inside the thick walls of a prison (...) a person could feel a supreme sense of 'bad' security."[333]

Another analytical difficulty stems from the relationship between the objective and subjective conditions of security. While these may be correlated, the subjective condition of security may be rather unrelated to the level of threat faced objectively. Massimo Pavarini has made this argument in the context of policy responses to Italian crime statistics and corresponding public demands for increased security. He has pointed out that:

> The growing social demand for security against crime reflects subjective feelings of insecurity, regardless of whether this sense of insecurity is or is not well founded and the results of an objective state of diminished security. This growing demand for security manifests itself as a protest against the institutional and public offerings of social defence. Institutional and public efforts to provide safeguards against criminality are perceived as being unable to meet the social demand for security.[334]

The suitability of the concept of security as a tool for meaningful analysis of counter-terrorism law and policy is further called into question by the fact that the state's policy responses to "security issues" may diminish as well as increase security.[335] Buzan has described this paradox as "security and the two faces of the state".[336] He has observed that "the state is a major source of both threats to and security for individuals."[337] This paradox is particularly manifest in the context of counter-terrorism. Measures that potentially increase security by means of decreasing the likelihood of a

[329] Zedner, *Security*, 14.
[330] Ibid, 16.
[331] Ibid.
[332] Christian Enemark, *Disease and Security* (London: Routledge, 2007), 6.
[333] Ibid.
[334] Massimo Pavarini, "Controlling Social Panic: Questions and Answers about Security in Italy at the End of the Millennium," in R. Bergalli and C. Summer (eds.), *Social Control and Political Order: European Perspectives at the End of the Century* (London: Sage, 1997): 79 (75-95)
[335] See also the discussion Chapter 2 above.
[336] Buzan, *People, States and Fear*, 39.
[337] Ibid, 35.

terrorist attack may equally increase insecurity for individuals as they diminish traditional safeguards and restraints against excessive state power.[338]

The above discussion has sought to demonstrate that "security" is ill-suited as an analytical tool for the examination and the evaluation of counter-terrorism law and policy. Nevertheless, the discourse has also revealed that the existence or absence of certain threats has been central to attempts to define security. It is submitted in this thesis that it is a focus on the identification of threats that should be integral to a comprehensive analysis of counter-terrorism law and policy. The term "threat", of course, is also open to various definitions. Interestingly, neither the Oxford Concise Dictionary of Politics nor the Penguin Dictionary of International Relations contains entries on the term "threat". The Farlex Online Dictionary, however, defines it broadly as:

1. An expression of an intention to inflict pain, injury, evil, or punishment;
2. An indication of impending danger or harm;
3. One that is regarded as a possible danger; a menace.[339]

In the context of political science, Richard Ullman has defined "threat" as an "action or sequence of events that... threatens drastically and over a relatively brief span of time to degrade the quality of life for the inhabitants of a state."[340] Similar to the attempts to define security, however, definitions are too broad and vague to have any meaningful analytical value. At the same time they are useful in pointing to some of the central characteristics of what is commonly understood to be a threat. It is thus submitted here that rather than applying vague definitions of "security" and "threat" it is imperative to identify the sources and potential targets of specific threats. In other words, one must determine "who" threatens "whom" or "what". In the context of international terrorism this means that one must identify the source of the threat, and, in a second step, which value, institution or tradition is actually threatened. Such an analysis is a logical prerequisite for the examination of counter-terrorism law and policy. Only when the source and addressee of the terrorist threat is *reasonably well established* is it possible to evaluate the suitability and proportionality of counter-measures and legislative initiatives. This does not mean, of course, that one has to identify *exactly*, or with *absolute certainty*, who is doing the threatening. Also, it is not necessary to determine what, or who, *exactly* is threatened. Rather it is sufficient to identify *generally* the type of threat to be guarded against is as well as those most likely to carry it out.

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[338] This has also been recognised by earlier scholars of terrorism like Walter Laqueur who observed that the impact of terrorism cannot be measured solely in terms of the number of casualties inflicted; see Walter Laqueur, "Reflections on Terrorism," *Foreign Affairs* 65, no. 1 (1986): 87-100.
[339] Farlex Online Dictionary, "Threat," <http://www.thefreedictionary.com/threat>.
[340] Richard H. Ullman, "Refining Security," *International Security* 8, no. 1 (1983): 133.

2. The Source of the Threat of Contemporary International Terrorism

Establishing the exact source of the threat of contemporary international terrorism is difficult, not least because terrorism is a tactic or strategy that can be employed by a variety of state as well as non-state actors.[341] Indeed, terrorism has been practiced by a broad array of political organisations for furthering their objectives for centuries. It has been employed by right-wing and left-wing groups, nationalistic groups, religious groups, revolutionaries, as well as by governments.[342] While terrorist tactics have been used throughout history, the year 1968 is commonly associated with the advent of "modern" international terrorism.[343]

The current threat of terrorism is generally associated with so-called Islamist or Jihadi terrorism, although the usage of both terms is controversial.[344] A number of attacks and threats associated with this form of terrorism – most notably the 9/11 attacks – have led governments around the world to introduce of a range of new counter-terrorism measures including special anti-terrorism legislation. A key exponent of Islamist terrorism is Al Qaeda which was reportedly founded by in the late 1980s by fighters of the Mujahideen campaign against Soviet forces in Afghanistan.[345] In the 1990s it was based in Khartoum, Sudan, from where it planned and conducted overt and covert operations including the 1998 bombings of the US embassies in Kenya and Tanzania and the attack on the US Navi destroyer USS Cole in the Yemeni Port of Aden .[346] However, most commentators agree that Al Qaeda is not a traditional terrorist group with control and command structures but that is best described it as a decentralised network. Writing in 2007, Paul Wilkinson, for example has pointed out that:

> Al-Qaeda is a transnational network of 'ism' rather than a traditional highly centralised and tightly controlled terrorist organisation. Its worldwide network of networks is bound together with a shared hatred of the USA and other Western countries, Israel, and the government of the regimes of Muslim countries which Al-Qaeda's

[341] See generally Peter R. Neumann and Michael L. R. Smith, *The Strategy of Terrorism: How It Works, and Why It Fails* (London: Routledge, 2008).
[342] For a classification of terrorist groups, see, e.g., Ariel Merari, "A Classification of Terrorist Groups", *Studies in Conflict and Terrorism* 1 (1978): 331-46.
[343] Bruce Hoffman, *Inside Terrorism*, (New York: Columbia University Press, 1998), 67.
[344] See, e.g., Jamal R. Nassar, *Globalization and Terrorism: The Migration of Dreams and Nightmares* (Lanham, MD, Rowman & Littlefield, 2nd ed., 2004); Karim H. Karim, *Islamic Peril: Media and Global Violence* (Montreal: Black Rose Books, 2003); Karen Armstrong, "The Label of Catholic Terror was Never Used about the IRA," *Guardian* (London), 11 July 2005; Karen Armstrong, *Islam: A Short History* (New York: Random House, 2000); Bernard Lewis, "Islamic Terrorism?" in Benjamin Netanyahu (ed.), *Terrorism: How The West Can Win* (New York: Farrar Straus Giroux, 1987) 45-67.
[345] See, e.g., Peter L. Bergen, *The Osama bin Laden I Know: An Oral History of al Qaeda's Leader* (New York: Free Press, 2006) 74-80.
[346] Rohan Gunaratna, *Inside Al Qaeda* (London: Hurst, 2002) 95.

> leaders accuse of being 'apostates' on the grounds that they 'betray' the 'true Islam' as defined by bin Laden.[347]

Other authors go further and even question the accuracy of portraying Al Qaeda as a network.[348] They argue that the term "network" is misleading as it still implies that a well-organised core leadership in charge of the organisation or network continues to exist.[349] These scholars prefer to refer to Al Qaeda as an ideology. As Jason Burke put it:

> [Al Qaeda] is less an organization than an ideology. The Arabic word *qaeda* can be translated as a 'base of operation' or 'foundation,' or alternatively as 'precept' or 'method'. Islamic militants always understood the term in the latter sense.[350]

Nevertheless, while Al Qaeda may be most accurately described as an "ideology" rather than an "organisation" or network", such classification is hardly constructive for the purposes of identifying the source of contemporary international terrorism. As Philippe Errera has observed, "simply saying that we are dealing with a nebulous phenomenon obeying the partly random laws of amorphous organic growth is neither intellectually satisfying nor operationally useful."[351] In order to escape these analytical difficulties, Errera proposed to employ the image of "three circles" to describe different threat dimensions.[352] This is a useful analytical distinction which will be adopted in this thesis.

According to Errera the first circle consists of the "traditional" al-Qaeda leadership, i.e. Osama Bin Laden and other individuals who planned the 1998 US embassy bombings in East Africa, or the attack on the USS Cole and 9/11.[353] Significant progress has been made in disrupting the activities of this first circle. Since 9/11, 15 leading Al-Qaeda figures have been captured or killed, and over 3,000 suspected Al-Qaeda operatives have been arrested or detained.[354] In spite of these severe blows the "traditional" circle continues to pose a considerable threat. As Paul Wilkinson has observed:

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[347] Paul Wilkinson, "The Threat from the Al-Qaeda Network", in Paul Wilkinson (ed.), *Homeland Security in the UK: Future Prepardness for Terrorist Attacks since 9/11* (London: Routledge, 2007), 25.
[348] See, e.g., Marc Sageman, *Leaderless Jihad: Terror Networks in the Twenty-first Century* (Philadelphia, PA: University of Pennsylvania Press, 2008).
[349] See, e.g., Bruce Hoffman, "Al Qaeda, Trends in Terrorism, and Future Potentialities: An Assessment," *Studies in Conflict and Terrorism* 26, no. 6 (2003): 429-42; Bruce Hoffman, "The Changing Face of Al Qaeda and the Global War on Terrorism," *Studies in Conflict and Terrorism* 27, no. 6 (2004): 549-60; see generally Marc Sageman, *Understanding Terror Networks* (Philadelphia, PA: University of Pennsylvania Press, 2004).
[350] Jason Burke, "Think Again: Al Qaeda," *Foreign Policy*, Iss. 142 (May/June 2004): 18.
[351] Philippe Errera, "Three Circles of Threat," *Survival* 47, no. 1 (2005): 72.
[352] Ibid, 71-88.
[353] Ibid, 72-73.
[354] Wilkinson, "The Threat from the Al-Qaeda Network," 25.

> It is dangerous illusion to assume that because Al-Qaeda's core leadership does not carry out the detailed planning, organisation and implementation of all the attacks carried out in it name the movement no longer exists or has a purely marginal role. Bin Laden and Ayman Zawahiri provide the crucial ideological leadership and strategic direction of the movement. It is they who inspire new recruits to join the global jihad and to be ready to sacrifice their lives as suicide bombers for the cause.[355]

In the second circle are terrorist groups that may share some of the transnational ideology of the traditional Al-Qaeda leadership, but which were born out of local conflicts.[356] The groups of the second circle mainly feed off localised grievances and define their objectives mostly in reference to local political conditions. Oliver Roy, for instance, has therefore characterised these groups as "territorialised".[357] Although these assertions may possibly elicit debate from specialists, and criticism from political leaders whose interest it is to portray "their" terrorists exclusively as al-Qaeda affiliates or "franchisees", one could place in this category groups like the Kashmiri Lashkar-e Taiba and the Palestinian Islamic Jihad.[358] In South-east Asia, organsations belonging to the second circle would include Jemaaah Islamiyah, the Abu Sayyaf Group, the Moro Islamic Liberation Front, the Misuari Renegade/Breakaway Group and the Philippine Rajah Sulaiman movement.[359]

Nevertheless, the boundaries of the second circle are not fixed and there are no universal metrics to measure and characterise relations between the groups or networks of the first and second circles. This means that operational and financial links may exist between the two circles. These links, however, are unlikely to be of fundamental importance to the operation of the respective organisation or group. As Errera has put it:

> (...) jihadist rhetoric may be used by a nationalist group for purely opportunistic purposes (to ingratiate itself with funders, or appeal to potential recruits), or it may indeed reflect the evolving identity of the group; financial or operational links between a jihadist organisation and a local group may simply represent opportunities seized on the go (terrorist one-night stands), or they may become the source of an ever closer relationship, whether utilitarian (marriages of convenience) or heartfelt. Nevertheless, on the whole, this second circle is still

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[355] Ibid.
[356] Errera, "Three Circles of Threat," 73.
[357] Olivier Roy, *Globalized Islam* (New York: Columbia University Press, 2004) 43.
[358] Errera, "Three Circles of Threat," 73.
[359] Zachary Abuza, "Funding Terrorism in Southeast Asia: The Financial Network of Al Qaeda and Jemaah Islamiyah," *The National Bureau of Asian Research* 14, no. 3 (December 2003) at <http://www.nbr.org/publications/analysis/pdf/vol14no5.pdf>. See generally Zachary Abuza, *Militant Islam in Southeast Asia: Crucible of Terror* (Boulder, CO: Lynne Rienner, 2003); Greg Barton, *Jemaah Islamiyah: Radical Islam in Indonesia* (Singapore: Singapore University Press, 2005); David Martin Jones, Michael L. R. Smith and Mark Wedding, "Looking for the Pattern: Al Qaeda in Southeast Asia – The Genealogy of a Terror Network," *Studies in Conflict and Terrorism* 26, no. 4 (2003): 443-57.

> composed of groups and individuals whose primary objective is not that of Osama Bin Laden; ridding the world of Jews, infidels and apostates would be nice, but in the meantime they will probably settle for less.[360]

The third circle consists of individuals or groups of individuals who profess to act in the name of Al Qaeda but who may not have any connections to the first and second circles. It is these individuals or groups that are commonly referred to as "home-grown" terrorists or "jihadists". Nonetheless, as with the second circle, the exact outline of the third circle cannot be drawn, partly because individuals belonging to this circle tend to operate autonomously and for a range of different reasons. As George Tenet, a former CIA director, has observed:

> (...) these far-flung groups increasingly set the agenda, and are redefining the threat we face. They are not all creatures of Bin Laden, and so their fate is not tied to his. They have autonomous leadership, they pick their own targets, they plan their own attacks.[361]

The potential size of the third circle is uncertain as future recruits may currently have no visible violent, "terrorist" or radical tendency. In fact, the processes of radicalisation, including the psychological and social dynamics that lead from alienation to action, are complex, obscure and subject to change over time. Research into this multifaceted issue suggests that violent extremism is always engendered by a range factors which include not only religious aspects but also personality, nationalism, separatism and discrimination.[362] Scholars commonly agree that no single root cause is instrumental.[363] Furthermore, they note that the root-causes and radicalisation dynamics vary from country to country. A Dutch analysis of the population of the Netherlands, for example, found that an attraction to violence, rather than fundamentalism, was a key factor in radicalisation processes.[364] The 2004 Madrid bombings, on the other hand, were carried out by resident ethnic Moroccans who sought to punish the Spanish government for its support for the US-led "War on Terrorism".[365] Similarly, in the case of the suicide-bombers that perpetrated the 7/7 attacks in London, an ill-conceived desire for international justice constituted a key motivational factor.[366]

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[360] Errera, "Three Circles of Threat," 74.

[361] Quoted in Jim Garamone, "Tenet Briefs Senate on Terror Threats," 24 February 2004, <http://www.defenselink.mil/news/newsarticle.aspx?id=27261>.

[362] See, e.g., Jon Cole and Benjamin Cole, *Martyrdom: Radicalisation and Terrorist Violence among British Muslims* (London: Pennant Books 2009); Magnus Ranstorp (ed.), *Understanding Violent Radicalisation* (London: Routledge, 2009); Rik Coolsaet, *Jihadi Terrorism and the Radicalisation Challenge in Europe* (Aldershot: Ashgate, 2008); Rachel Briggs, Catherine Fieschi and Hannah Lownsbrough, *Bringing it Home: Community-based Approaches to Counter-Terrorism* (London: Demos, 2006); Kent Hughes Butts and Jeffery C. Reynolds, *The Struggle against Extremist Ideology: Addressing the Conditions that Foster Terrorism* (Carlisle, PA: Centre for Strategic Leadership, 2005).

[363] See also Robert S. Leiken, "Europe's Angry Muslims," *Foreign Affairs* 84, no. 4 (July/August 2005): 120-35.

[364] Lidewijde Ongering, "Home-Grown Terrorism and Radicalisation in the Netherlands: Experiences, Explanations and Approaches," Testimony before the U.S. Senate Homeland Security and Governmental Affairs Committee, 27 June 2007.

[365] See generally, Fidel Sendagorta, "Jihad in Europe: The Wider Context," *Survival* 47, no. 3 (2005): 63-72.

[366] Three of the bombers were British citizens, and the report makes plain that this was not just a technical matter of passports or residence status. They were far from destitute; born to Pakistani immigrants, they attended secular state schools and received government and family support throughout their short lives. The fourth bomber was a Jamaican

Still, while the biographies of the 7/7 bombers illustrated how the making of an Al Qaeda-inspired suicide bomber is an idiosyncratic narrative of push and pull, the UK Government's official report concluded that there was no consistent profile that could be used to help identify who might be vulnerable to radicalisation.[367]

In spite of the wide array of factors that contribute to the radicalisation of individuals who turn to militant action, Kimberley Thachuk, Marion Bowman and Courtney Richardson have attempted to categorise the individuals and groups that fall under third circle.[368] Focussing on Islamist violence, they argue that home-grown terrorists may generally fall into three categories:

- immigrants and visitors (legal or illegal);
- second and third-generation members of the Muslim diaspora community;
- converts to Islam.[369]

Thachuk, Bowman and Richardson acknowledge that these categories are not mutually exclusive – for example, immigrants may undergo religious conversion after arriving in the country in which they eventually plot acts of terrorism. Echoing some the findings of the UK Government's report on the 7/7 London bombings, they note that most individuals susceptive to radicalisation are between the ages of 15 and 30 and have no particular racial or criminal profile to distinguish them – although once in the group they tend to wear similar clothes, display similar facial hair, and eat similar food.[370] Many are married and have postsecondary education, with computer science, science, and medical degrees topping the list.[371] Few have any formal religious education; they only encounter religion when they become "born again" in their militant group.[372] They gain much of their information from websites, and often add to those websites, which can mutate faster than the groups that are constantly being formed.[373] In this way the "jihadist" spirit is maintained and spread quickly and efficiently.

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immigrant who converted to Islam, and whose life was more troubled and erratic. The ringleader, Mohammad Sidique Khan, even worked for a time at a British welfare agency; later, he was a well-liked teacher's aide.

[367] Report of the Official Account of the Bombings in London on 7th July 2005 (11 May 2006): 26-28, <http://www.official-documents.gov.uk/document/hc0506/hc10/1087/1087.asp>.

[368] Kimberley L. Thachuk, Marion E. Bowman and Courtney Richardson, *Homegrown Terrorism: The Threat Within* (Washington, DC: Center for Technology and National Security Policy, National Defense University, May 2008).

[369] Ibid, 3-5.

[370] Ibid, 8. Approximately 80 percent of the people who become radical Islamic militants join in the Diaspora community via friends in soccer clubs, social groups, and local mosques. Recruitment is self-starting; groups of about eight persons are formed who become very close knit and who associate like a family, eating together, and even marrying each others' sisters.

[371] Ibid.

[372] Ibid.

[373] Irving Lachow and Courtney Richardson, "Terrorist Use of the Internet: The Real Story," *Joint Force Quarterly* 45, no. 2 (2007): 100-103.

3. How Does Contemporary International Terrorism Threaten Western Democracies?

Chapter 2 illustrated how the Australian government portrayed the threat of international terrorism. Prime Minster Howard and other Cabinet ministers took the view that terrorism threatened Australia's "values" and "way of life".[374] Moreover, international terrorism was deemed to threaten Australia's peace and security, and more generally, the existence of Western civilization itself.[375] The Australian government, of course, was not alone in portraying the terrorist threat as the ultimate security challenge. Government officials elsewhere as well as scholars and commentators argued that international terrorism represented an unprecedented threat to a variety of things including lives, values, freedom and democracy. Some even claimed that international terrorism posed a greater threat than the threats posed by war and natural disasters. Having identified the sources of the threat in the previous section, this section questions the severity of the threat and aims to examine how international terrorism threatens stable Western democracies like Australia. The analysis includes a brief examination of the effects of recent major terrorist attacks like 9/11, the 2004 Madrid bombings and the 7/7 London bombings. It will first examine the *objective* dimension of the terrorist threat and then concentrate on its *subjective* dimension.

a) Contemporary Terrorism as a Threat to Safety and Individual Physical Integrity

International terrorism unquestionably threatens the safety and physical integrity of individuals as well as property. This was officially recognised as early as in 1930. For example, the *Third Conference for the Unification of Penal Law* held in Brussels that year under the auspices of the International Association of Penal Law defined the act of terrorism as "the deliberate use of means capable of producing common danger" to commit "an act imperilling the life, physical integrity or human health or threatening to destroy substantial property."[376] Much of this definition holds true today. Recent terrorist attacks resulted in substantial loss of live and considerable damage to property. The 2002 Bali attacks, for instance, killed 202 people and injured 200. The 2004 Madrid bombing resulted in the deaths of 192 and left 2050 injured. The 2005 London bombings killed 56 people and resulted in around 700 people injured. The 9/11 attacks in New York and Washington were by far the most destructive. The attacks claimed the lives of 3017 people and injured over

[374] Quoted in Sue Neales, "Terrorism fight 'will last for decades'," *The Australian* (Sydney), 14 July 2007.
[375] Philip Ruddock, "International and Public Law Challenges for the Attorney-General," Address to the Law Faculty, Australian National University, Canberra, 8 June 2004, paragraphs 6-7, available at <http://law.anu.edu.au/cipl/Lectures&Seminars/04%20Ruddockspeech%208June.pdf>; see also Downer, "Transnational Terrorism: The Threat to Australia", 15 July 2004.
[376] Quoted in Robert Kolb, "The Exercise of Criminal Jurisdiction over International Terrorists," in Andrea Bianchi (ed.), *Enforcing International Law Norms against Terrorism* (Oxford: Hart, 2004) 237.

6300. Nonetheless, it should be kept in mind that 9/11 was extreme event: until then, and at no time thereafter, no more than few hundred people were killed in a single terrorist attack by a non-state actor.

What sets these recent attacks apart from previous experiences of terrorism – particularly left-wing and nationalist or separatist violence – is the fact that the suicide bombers seemingly wanted to kill, and kill more or less randomly, for revenge or as an act of what they took to be war. While it was once perhaps safe to conclude that terrorism was committed principally for specific political demands or as a form of political expression, the desire to inflict maximum casualties appears to be an integral component of contemporary forms of terrorist violence. As a consequence, Brian Jenkins' oft-repeated observation that "terrorists want a lot of people watching, not a lot of people dead" may no longer be an accurate description of the state of affairs today.[377] Moreover, the suicidal nature of many attacks, while not necessarily new, appears to be particularly unsettling because deterrence of the would-be perpetrator becomes extremely difficult.[378] This has led to some debate among commentators and scholars whether we are in fact facing a "new" kind of terrorism.[379]

The changed characteristics of the "new" terrorism notwithstanding, it is important to recognise in the context of a threat assessment that conventional forms of violence such as traditional and civil wars have almost always been more deadly. For example, according to estimates published in *The Economist*, the first eighteen months of the 2003 war in Iraq alone resulted in the deaths of over 100,000 Iraqis.[380] In the case of Afghanistan, Marc Herold, a professor of economics at the University of New Hampshire who has been tracking casualties since 2001, reported that according to even "most conservative estimates", Afghan civilian deaths (excluding Taliban fighters and Afghani police) resulting from American/NATO operations numbered between 5,700 and 6,500.[381] The figures are even worse in the case of civil war and intra-state conflict. According to UN estimates, the fighting in Sudan's western Darfur region has left as many as 450,000 dead from

[377] Brian M. Jenkins, "International Terrorism: A New Mode of Conflict," in David Carlton and Carlo Schaerf (eds.), *International Terrorism and World Security* (New York: Wiley, 1975) 15.
[378] John E. Mueller, "Terrorism, Overreaction and Globalization," in Richard N. Rosecrance and Arthur A. Stein (eds.), *No More States?: Globalization, National Self-determination, and Terrorism* (Lanham, MD: Rowman & Littlefield, 2007) 46-76.
[379] See e.g. Peter R. Neumann, *Old and New Terrorism* (Cambridge: Polity Press, 2009), 14-48 with further references.
[380] *The Economist*, 6-12 November 2004, 81-2.
[381] "Counting the casualties in Iraq and Afghanistan," *The Toronto Star* (Toronto), 23 September 2007, <http://www.thestar.com/columnists/article/259269>.

violence and disease and over 2,000,000 displaced.[382] Similarly, the civil war in Somalia has resulted in over 300,000 people killed.[383]

The objective significance of terrorism as a threat to safety and individual physical integrity further diminishes when one compares terrorism-related fatalities to fatalities totally unrelated to political or armed violence. In the United States, for example, terrorism poses a far lesser statistical threat to life than most other activities. While 1440 US citizens died in terrorist attacks in 2001, three times as many died of malnutrition, and almost 40 times as many people died in car accidents during the same year.[384] Even with the 9/11 attacks included in the count, the number of Americans killed by international terrorism since the late 1960s (when the State Department began counting) is about the same as the number of Americans killed over the same period by severe allergic reaction to peanuts, lightning, or accident-causing deer.[385] Similarly, the number of annual deaths from Sports Utility Vehicles (SUVs) is reported to be greater than the total number of deaths caused by all terrorist acts combined.[386] Furthermore, it is still to be more likely to get killed by bee stings or DIY accidents than being killed in a terrorist attack.[387]

At the global level, the statistics are equally revealing. Anthony Cordesman and Brian Jenkins have independently provided lists of violence committed by Islamist extremists outside of such war zones as Iraq, Israel, Chechnya, Sudan, Kashmir, and Afghanistan, whether that violence be perpetrated by domestic terrorists or by ones with substantial international connections.[388] Included in the count are such terrorist attacks as those that occurred in Bali in 2002, in Saudi Arabia, Morocco, and Turkey in 2003, in the Philippines, Madrid, and Egypt in 2004, and in London and Jordan in 2005. The lists include not only attacks by Al Qaeda, but also those by its imitators, enthusiasts, and wannabes as well as ones by groups with no apparent connection to it whatever. The total number of people killed in the five years after 9/11 in such incidents comes to some 200-300 per year. By comparison, over the same period far more people have perished in the United States alone in bathtubs drownings.[389] Perhaps even more significant, the numbers of annual deaths

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[382] "Hundreds Killed in Attacks in Eastern Chad," *Washington Post*, 11 April 2007.
[383] "Somalia: Hundreds of thousands killed in years of war, says new president," 5 November 2004, <http://www.globalsecurity.org/military/library/news/2004/11/mil-041105-irin03.htm>.
[384] Sarah Stephen, "Terrorism: Governments Fuel Fear," in Justin Healey (ed.), *Terrorism* (Balmain, NSW: Spinney Press, 2004), 39.
[385] John E. Mueller, "Terrorism, Overreaction and Globalization," 48. The 3572 people who died in terrorist attacks in 2001 were three times more likely to die from being hit by lightning.
[386] Russel Hardin, "Civil Liberties in the Era of Mass Terrorism," *Journal of Ethics* 8, no. 1 (2004): 79.
[387] Richard Jackson, *Writing the War on Terror: Language, Politics and Counter-terrorism* (Manchester: Manchester University Press, 2005), 93.
[388] Brian Michael Jenkins, *Unconquerable Nation: Knowing Our Enemy and Strengthening Ourselves* (Santa Monica, CA: RAND Corporation, 2006) 179-84; Anthony H. Cordesman, *The Challenge of Biological Weapons* (Washington, DC: Center for Strategic and International Studies, 2005) 29-31.
[389] John Stossel, *Give Me a Break* (New York: HarperCollins, 2004) 77.

from terrorism pale into insignificance next to the 40,000 people who die every day from hunger, the 500,000 people who are killed every year by the use of small arms and light weapons and the millions who die annually from diseases like influenza (3.9 million annual deaths), HIV-AIDS (2.9 million annual deaths), diarrhoeal illnesses (2.1 million annual deaths) and tuberculosis (1.7 million annual deaths).[390]

As Christian Enemark has pointed out, these comparisons nobly assume, of course, that one death is worth the same as any other.[391] Nonetheless, they demonstrate that international terrorism poses a negligible threat to safety and individual physical integrity. As a consequence, hysteria and hysterical overreaction about terrorism as a threat to life and health is hardly required and can, in fact, be costly and counterproductive.

b) Contemporary Terrorism as a Threat to the Democratic State

In the post 9/11 era, government officials in the United States, Australia and elsewhere portrayed terrorism as an unprecedented threat to Western democracies, directly challenging global peace and stability, and imperilling the democratic way of life.[392] Scholars, too, have argued that only twelve years after the end of the Cold War the United States, and the West more generally, faced a new "existential" threat.[393] The new wave of terrorism, so the argument ran, even challenged the legitimacy of the state itself: if governments were unable to safeguard the physical safety and integrity of their own citizens, then citizens could have little faith in the protective function of the state.[394]

While international terrorism may pose new challenges for governments, the notion that it is threatening the very basis of power and legitimacy of the liberal democratic state is rather unconvincing. Indeed, one may well argue that such an assessment is a classic case of threat inflation. As Andrew O'Neil has observed:

> The idea that extreme, but diffuse, Islamist groups operating loosely under the Al Qaeda banner pose a clear and direct threat to the foundations of Western civilisation and to states that embody Western values (that is, liberal

[390] Jackson, *Writing the War on Terror*, 93.
[391] Enemark, *Disease and Security*, 10.
[392] See the discussion in Chapter 3 above.
[393] See, e.g., Ariel Cohen, "Promoting Freedom and Democracy: Fighting the War of Ideas against Islamic Terrorism," *Comparative Strategy* 22, no. 3 (2003): 218.
[394] See, e.g., Kurth Cronin, "Rethinking Sovereignty," 134.

> democracy, capitalism) would be laughable if it were not taken with such apparent deadly seriousness by policy makers and non-official observers in the media and academia.[395]

Western values and the political and economic structures that express them are far too robust to susceptive to destabilisation by terrorist attacks, however horrific and genuinely tragic they may be. Even 9/11, the most audacious and single largest terrorist attack in history, did not compromise the essential workings of government. Similar observations can be made regarding other terrorist attacks, both past and present. Historically, non-state terrorist activity has neither significantly undermined nor damaged the national cohesiveness or integrity of liberal democracies.[396] Germany, Italy, the United Kingdom, and many other countries – including Israel – have lived with terrorist activity for many years without such activity seriously threatening their very existence. In fact, it could be argued that previous experiences of political violence posed a somewhat greater threat to the stability states. In particular left-wing and separatist terrorism campaigns in Europe enjoyed a certain degree of popular support or sympathy, at least as far as key political objectives were concerned. This meant that these campaigns had a form of legitimacy to them which was far more threatening to the stability of Western democracies than contemporary Islamist terrorism.

In addition to the lack of public legitimacy (in Western democracies), there is some evidence to suggest that recent terrorist attacks appear to have strengthened public morale and resolve. This, in turn, makes terrorism a lesser threat to the stability and functioning of Western liberal democracies. In a 2006 study on public panic and morale in the aftermath of terrorism attacks, for instance, Edgar Jones, Robin Woolven, Bill Durodie and Simon Wessely found that unless terrorists are able to deliver concentrated attacks on a large scale, it is unlikely that their efforts will have a catastrophic effect on public morale.[397] Examining *inter alia* the impact of the London 7/7 bombings they have pointed out that:

> (...) although London, by virtue of being the seat of government and the UK's financial centre, has been the terrorist's principal focus, it ought to be the city best able to survive their attacks with its morale intact. Essential services are dispersed, transport networks varied and the population so substantial that large areas are likely to survive unscathed. There has also been substantial planning for, and investment in, a range of effective

[395] Andrew O'Neil, "Keeping the Contemporary Threat Environment in Perspective," *Australian Review of Public Affairs*, 31 May 2004, <http://www.australianreview.net/digest/2004/05/oneil.html>.
[396] Adam Roberts, "The 'War on Terror' in Historical Perspective," *Survival* 47, no. 2 (2005): 101-30. It is essential to differentiate between stable democracies and fragile states. While terrorist attacks may have the potential to destabilise fragile states and states experiencing civil strife, the same cannot be said in relation to stable Western democracies.
[397] Edgar Jones, Robin Woolven, Bill Durodie and Simon Wessely, "Public Panic and Morale: Second World War Civilian Responses Re-examined in the Light of the Current Anti-terrorist Campaign," *Journal of Risk Research* 9, no. 1 (2006): 57-73.

> electronic communications. In addition, the culture of the capital includes the experience of surviving both the Blitz and a succession of IRA bombing campaigns.[398]

Similarly, while opinion polls indicate that the US population felt more vulnerable after 9/11, there is also much evidence to suggest that the attacks brought diverse groups together in a way not seen before.[399] Americans responded with anger, fear, heartbreak, and anxiety. However, when asked about the nation's leader, citizens responded with nearly universal support and President Bush's approval rating skyrocketed to unprecedented levels.[400] Symbols of American nationalism and morale were evident in forms such as US flags proudly flown on buildings, to vehicle bumper stickers with slogans such as "These Colors Don't Run."[401] This suggests that even the extreme events of 9/11 did not destroy the morale of the US public. If anything, they had the reverse effect, a phenomenon also evident in public calls for resilience. Senator John McCain, for instance, emphasising the statistical insignificance of terrorism, called on Americans to:

> Get on the damn elevator! Fly on the damn plane! Calculate the odds of being harmed by a terrorist! It's still about as likely as being swept out to sea by a tidal wave. Suck it up, for crying out loud. You're almost certainly going to be okay. And in the unlikely event you're not, do you really want to spend your last days cowering behind plastic sheets and duct tape? That's not a life worth living, is it?[402]

Perhaps most of the alarm that terrorism poses a grave threat to the stability or even the very existence of democratic states, however, stems from the claim that terrorists may employ "weapons of mass destruction" in future attacks.[403] Joshua Goldstein, for instance, warned that the likelihood of terrorists exploding nuclear weapons in the United States in a crowed area was "not negligible".[404] He appeared convinced that terrorists could "destroy our society" and that a single small nuclear detonation in Manhattan would "overwhelm the nation."[405] Similarly, Michael Ignatieff warned that "a group of only a few individuals equipped with lethal technologies" threaten "the ascendancy of the modern state."[406] Graham Allison, too, claimed that nuclear terrorists could

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[398] Ibid, 62.
[399] Quoted in Jack N. Kondrasuk and Elizabeth Arwood, "A US Analysis of Terrorism," in Ronald J. Burke and Cary L. Cooper (eds.), *International Terrorism and Threats to Security: Managerial and Organizational Challenges* (Cheltenham: Edward Elgar, 2008) 38.
[400] Cindy D. Kam and Jennifer M. Ramos, "Joining and Leaving the Rally: Understanding the Surge and Decline in Presidential Approval Following 9/11," *Public Opinion Quarterly* 72, no. 4 (2008): 619-50.
[401] Kondrasuk and Arwood, 38.
[402] John McCain with Mark Salter, *Why Courage Matters* (New York: Random House, 2004)35-6.
[403] See generally Michael Levi, *On Nuclear Terrorism* (Cambridge, MA: Harvard University Press, 2007); Brian Michael Jenkins, *Will Terrorists Go Nuclear?* (Amherst, NY: Prometheus Books, 2008).
[404] Joshua S. Goldstein, *The Real Price of War: How You Pay for the War on Terror* (New York: New York University Press, 2004) 179.
[405] Ibid.
[406] Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton, NJ: Princeton University Press, 2004) 146.

"destroy civilization as we know it."[407] And Richard Posner declared that "the terrorist menace, far from receding, grows every day (...) because weapons of mass destruction are becoming ever more accessible to terrorist groups and individuals."[408]

While it cannot be ruled out completely, that terrorist may, at some stage in the future, gain access to nuclear devices, the current alarm is exaggerated. Indeed, arguments warning about nuclear terrorism are highly speculative and based on theoretical worst-case scenarios rather than factual evidence. As Bruce Hoffman has observed, many academic terrorism analyses have been "self-limited to mostly lurid hypotheses of worst case scenarios, almost exclusively involving CBRN (chemical, biological, radiological or nuclear) weapons, as opposed to trying to understand why – with the exception of September 11th – terrorists have only rarely realized their true killing potential."[409] In fact, there are at least as many theoretical arguments against the terrorist use of nuclear devises as there are in favour. Robin Frost, for instance, argued "that the risk of nuclear terrorism, especially true nuclear terrorism employing bombs powered by nuclear fission, is overstated, and that popular wisdom on the topic is significantly flawed."[410] William Langewiesche shares this view. In his recent book, *Atomic Bazaar: The Rise of the Nuclear Poor*, Langewiesche assessed the process by means of which a terrorist group could acquire a nuclear device at some length.[411] He concluded that this possibility remained unlikely. Langewiesche clarified his assessment on in a television broadcast on C-SPAN:

> (...) the best information is that no one has gotten anywhere near this. I mean, if you look carefully and practically at this process, you see that it is an enormous undertaking full of risks for the would-be terrorists. And so far there is no public case, at least known, of any appreciable amount of weapons-grade HEU [highly enriched uranium] disappearing. And that's the first step. If you don't have that, you don't have anything.[412]

But even *if* terrorists gain access to nuclear devices, and even *if* they employ those devices in an attack, it remains questionable whether this poses an existential threat to the democratic state. Much would obviously depend on the size and quality of the nuclear device itself. The Gilmore Commission (1999-2003), a US Congressional Advisory Panel to Assess Domestic Response

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[407] Graham T. Allison, *Nuclear Terrorism: The Ultimate Preventable Catastrophe* (New York: Times Books/Henry Holt, 2004) 191.
[408] Richard A. Posner, "Our Domestic Intelligence Crisis," *Washington Post*, 21 December 2005.
[409] Bruce Hoffman, *Lessons of 9/11* (Santa Monica: RAND, 2002) 19-20; <http://www.rand.org/pubs/testimonies/2005/CT201.pdf>.
[410] Robin M. Frost, *Nuclear Terrorism after 9/11*, Adelphi Paper 378 (Abindgon: Routledge for the IISS, 2005), 7. For a critique of this article see, e.g., Anna M. Pluta and Peter D. Zimmerman, "Nuclear Terrorism: A Disheartening Dissent," *Survival* 48, no. 2 (2006): 55-69. See generally Jon Wolfsthal and Tom Collina, "Nuclear Terrorism and Warhead Control in Russia," *Survival* 44, no. 2 (2002): 71-83.
[411] William Langewiesche, *The Atomic Bazaar: The Rise of the Nuclear Poor* (New York: Farrar, Straus and Giroux, 2007).
[412] Quoted in John Mueller, "The Atomic Terrorist: Assessing the Likelihood," (1 January 2008): 4; <http://polisci.osu.edu/faculty/jmueller/APSACHGO.PDF>.

Capabilities for Terrorism Involving Weapons of Mass Destruction, for instance, examined the threat of CBRNN terrorism in some detail. It concluded that:

> (...) as serious and potentially catastrophic as a domestic terrorist CBRN attack might prove, it is highly unlikely that it could ever completely undermine the national security, much less threaten the survival, of the United States as a nation. This point should be self-evident, but given the rhetoric and hyperbole with which the threat of CBRN terrorism is frequently couched, it requires reiteration. Even Israel, a comparatively small country in terms of population and landmass, who throughout its existence has often been isolated and surrounded by enemy states and subjected to unrelenting terrorist attack and provocation, has never regarded terrorism as a paramount threat to its national security and longevity, worthy of profligate budgets or the diversion of disproportionate resources and attention. To take any other position risks surrendering to the fear and intimidation that is precisely the terrorist's stock in trade.[413]

The Gilmore Commission's findings hold true today. While politicians, academics and the media have focused attention on the threat of chemical, biological, radiological and nuclear attack, all post-9/11 bombings demonstrated that terrorists have continued to employ conventional devices rather than "weapons of mass destruction".[414] There is little evidence to suggest that this pattern will change anytime in the near future.

c) Contemporary Terrorism as a Threat to the Economy

Terrorism has also been portrayed as a significant threat to the economy with considerable implications for the national interest of countries affected. The economic destruction of 9/11 was indeed unprecedented (in terms of terrorist attacks). The attack on the World Trade Center alone and caused billions of dollars in property damage and reportedly destroyed 30 per cent of the office space in Lower Manhattan. Nevertheless, even the extreme events of 9/11 have not had an enduring impact on the world's most powerful economy (despite predictions that the attacks would trigger a recession). A 2002 report prepared for the US Congress, for example, analysed the economic effects of 9/11 and concluded that:

> The loss of lives and property on 9/11 was not large enough to have had a measurable effect on the productive capacity of the United States. For 9/11 to affect the economy it would have had to have affected the price of an

[413] Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction, *First Annual Report to the President and the Congress* (15 December 1999) 37; <http://www.rand.org/nsrd/terrpanel/terror.pdf>.
[414] See also John E. Mueller, "Simplicity and Spook: Terrorism and the Dynamics of Threat Exaggeration," *International Studies Perspectives* 6, no. 2 (2005): 208-34.

> important input, such as energy, or had an adverse effect on aggregate demand via such mechanisms as consumer and business confidence, a financial panic or liquidity crisis, or an international run on the dollar.[415]

The report further found that the existing data showed that GDP growth was low in the first half of 2001 and, further, that data published in October 2001 showed that the GDP had also contracted during the third quarter. This led to the claim that "the terrorist attacks pushed a weak economy over the edge into an outright recession."[416] However, the report did not find any evidence to back up this claim. At the time of 9/11 the US economy was in its third consecutive quarter of contraction and positive growth resumed in the fourth quarter. According to report, this suggested that any effects from 9/11 on demand were short lived. The report thus concluded that timely action contained the short run economic effects of 9/11 on the overall economy.[417]

A study focussing exclusively on the New York area reached similar conclusions.[418] In the aftermath of the 9/11 attacks, New York City's economy contracted briefly but sharply. Many businesses were forced to shut down, mostly temporarily, and tens of thousands of workers were either dislocated for a short time or lost their jobs. However, the study also found that although the attacks caused a sharp temporary disruption in the economy, an advantageous industry mix – one weighted toward high-paying, rapidly expanding industries – kept the city well positioned for growth over the medium term.[419] Similar conclusions were reached by a number of other studies.[420]

The terrorist attacks Madrid and London also did not have any lasting negative economic impacts in Spain and the United Kingdom respectively, nor on the European economy more generally.[421] For instance, the S&P 500 index dropped 1.5 percent on the day of the Madrid attacks.[422] However, it recovered most of that loss the next day. Similarly, there were limited immediate reactions to the 2005 London bombings in the world economy as measured by financial market and exchange rate

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[415] Gail Makinen, *The Economic Effects of 9/11: A Retrospective Assessment*, Report for Congress, 27 September 2002 (Washington, DC: Library of Congress, 2002).
[416] Ibid.
[417] Ibid. See also Olivia A. Jackson, "The Impact of the 9/11 Terrorist Attacks on the US Economy," 3 March 2008, <http://www.journalof911studies.com/volume/2008/OliviaJackson911andUS-Economy.pdf>; "How has September 11 Influenced the Global Economy," in the International Monetary Fund's World Economic Outlook Reports, Chapter II, December 2001; <http://www.imf.org/external/pubs/ft/wed/2001/03/index.htm>.
[418] Jason Bram, Andrew Haughwout, and James Orr, "Has September 11 Affected New York City's Growth Potential?" *Economic Policy Review* 8, no. 2 (November 2002), at
<http://www.newyorkfed.org/research/epr/02v08n2/0211bram/0211bram.html>.
[419] Ibid.
[420] See, e.g., Howard Chernick (ed.), *Resilient City: The Economic Impact of 9/11* (New York: Russell Sage Foundation, 2005); Harry W. Richardson, Peter Gordon, and James E. Moore II (eds.), *The Economic Impacts of Terrorist Attacks* (Cheltenham: Edward Elgar, 2005).
[421] R. Barry Johnson and Oana M. Nedelescu, "The Impact of Terrorism on Financial Markets," International Monetary Fund, Working Paper WP/05/60 (March 2005);
<http://www.internationalmonetaryfund.com/external/pubs/ft/wp/2005/wp0560.pdf>.
[422] Dune Lawrence, "U.S. Stocks Rise, Erasing Losses on London Bombings, Gap Rises," *Bloomberg News (Online)*, 7 July 2005, <http://www.bloomberg.com/apps/news?pid=10000103&sid=aflPCIrU37Ns&refer=us>.

activity.[423] The pound fell 0.89 cents to a 19-month low against the U.S. dollar. The FTSE 100 Index fell by about 200 points in the two hours after the first attack. While this was its biggest fall since the start of the 2003 Iraq war, by the time the market closed the index had recovered to only 71.3 points (1.36%) down on the previous day's three-year closing high.[424]

Markets in France, Germany, the Netherlands and Spain also closed about 1% down on the day. US market indexes rose slightly, in part because the dollar index rose sharply against the pound and the euro. The Dow Jones Industrial Average gained 31.61 to 10,302.29. The Nasdaq Composite Index rose 7.01 to 2075.66. The S&P 500 rose 2.93 points to 1197.87 after declining up to 1%. Every benchmark gained 0.3%.[425] The markets picked up again on 8 July 2005 as it became clear that the damage caused by the bombings was not as great as initially thought. By close of trading the market had fully recovered to above its level at start of trading on 7 July 2005, the day of the attacks. These developments led the chief investment strategist at Prudential Equity Group LLC in New York, Edward Keon, to observe that "the markets reacted the way they often do under periods of great stress, initially dropping and then recovering."[426]

The examples of recent terrorist attacks suggest that terrorism does not have a significant *direct* effect on Western economies. Even extreme events like 9/11 failed to have a lasting *direct* impact on the US economy. However, the attacks did have considerable *indirect* effects. Gail Makinen, for instance, pointed out that over the longer run 9/11 adversely affected U.S. productivity growth because resources were being used to ensure the security of production, distribution, finance, and communication.[427] The yearly budget for the Office of Homeland Security, for instance, is set at over $50 billion.[428] And the economist Roger Congleton, for example, has calculated that the security measures that delay airline passengers by half an hour cost the economy $15 billion a year.[429] More generally, unprecedented amounts of money have been spent on improving infrastructural security at airports, highways, seaports, and electric and nuclear power facilities. Nevertheless, while the increased spending on "security" related issues may have had a considerable economical impact, it is important to recognise that this impact is *indirect* in nature. Rather than demonstrating that terrorism poses an economic threat, it may be argued that the

[423] Juan Sanchez, *Terrorism and its Effects*, Global Media, 2007.
[424] Ibid.
[425] Lawrence, "U.S. Stocks Rise, Erasing Losses on London Bombings, Gap Rises."
[426] Ibid.
[427] Makinen, *The Economic Effects of 9/11.*
[428] US Department of Homeland Security, *Budget-in-Brief, Fiscal Year 2010,* <http://www.dhs.gov/xlibrary/assets/budget_bib_fy2010.pdf>
[429] Roger D Congleton, "Terrorism, "Interest-Group Politics, and Public Policy," *Independent Review* 7, no. 1 (2002): 47-67.

extensive *indirect* economic effects of attacks strengthen the case for carefully calibrated and measured counter-terrorism law and policy.

d) Contemporary Terrorism, Fear and Subjective Threat Perception

It has been argued that *objectively* terrorism neither poses a significant threat to the safety and individual physical integrity nor affects the stability and economy of Western democracies. Nonetheless, as with the concept of security, the *objective* nature of a threat may diverge from *subjective* threat perceptions. In other words, while a threat may be *objectively* rather insignificant, the very same threat may be *subjectively* perceived as highly significant (and vice versa, of course). It appears that precisely this dynamic is at play in the context of the threat of international terrorism. As demonstrated, the terrorist threat to Western democracies is objectively rather low. Nevertheless, in spite of the odd chances of falling victim to a terrorism attack, opinion polls regularly reveal that terrorism ranks among the key concerns of the public. This phenomenon was also the subject of debate in a 2003 television interview with filmmaker and satirist Michael Moore on CBS's 60 Minutes programme. Moore noted that "the chances of any of us dying in a terrorist incident are very, very, very small." His interviewer, Bob Simon, promptly admonished, "But no one sees the world like that."[430] Both statements hold some truth to them.

Psychological research found that when the nature and scale of a threat is uncertain there is a tendency to misjudge its potential impact. Moreover, as Christian Enemark has observed, people are often more concerned with the manner in which they might die than they are with calculations of probability.[431] For example, chain-smokers who expressed concern about being killed in a terrorist attack would clearly be giving extra weight to the kind of death they feared more rather than the kind of death to which they are more likely to succumb.[432] Jessica Wolfendale explained why the fear of terrorism is different from the fear and anxiety felt about other threats to lives.[433] According to her analysis, the graphic nature of terrorist attacks and their apparent randomness (from the victims' point of view) greatly contribute to the terror they instil. She notes that psychological research on terror management theory suggests that events such as terrorist attacks forcefully

[430] Quoted in John Mueller, "A False Sense of Insecurity?" <http://www.cato.org/pubs/regulation/regv27n3/v27n3-5.pdf>.
[431] Enemark, *Disease and Security*, 10.
[432] Ibid.
[433] Jessica Wolfendale, "Terrorism, Security, and the Threat of Counterterrorism," *Studies in Conflict and Terrorism* 29, no. 7 (2006): 753-70.

remind us of our mortality.[434] Because of this, we desire reassurance and a sense of security that we do not require for less visible threats that pose a greater objective threat to our lives and well being. Terrorist attacks make human fragility and vulnerability highly salient.[435]

Karen Jones has offered an additional argument as to why the threat of terrorism is perceived differently from other threats, even if the objective likelihood of dying in a terrorism attack is much lower than being killed in an accident.[436] She noted that emotional reactions to harm caused by someone's deliberate actions are very different to a reaction to harm resulting from accidents, natural disasters, or unintentional human actions.[437] Furthermore, there is empirical evidence to suggest that post-traumatic stress is more likely to follow from sudden man-made violence than natural disaster. According to Jones, random acts of violence can radically disturb "basal security" – the unarticulated affective sense of safety and trust through which one (sometimes unconsciously) judges and assesses risks.[438] Basal security can thus determine how salient different risks appear, regardless of the statistical likelihood of a risked event occurring. By their extreme violence and seeming randomness, terrorist attacks can radically undermine victims' basal security.

Similarly, Wolfendale argued that one reason why terrorist threats evoke such strong reactions in (potential) victims is that unlike accidents, disease and natural disasters, malevolent actions send a message about "intrinsic moral worth."[439] Her findings complement the research of several scholars who have argued that part of the reason why terrorism is morally abhorrent is because the direct victims of the attack are not necessarily the intended audience of the attack.[440] As Igor Primoratz has pointed out, terrorist attacks have two principal targets: The first targets are the immediate victims of the attacks whose deaths are intended to intimidate a second group of people into a course of action they would not otherwise take.[441] The victims of the attacks are used as a means of coercion. Terrorist acts tell the victims in the most brutal way that, in the eyes of the terrorist, they are disposable.[442]

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[434] Ibid.
[435] See Mark J. Landau, et al., "Deliver Us From Evil: The Effects of Mortality Salience and Reminders of 9/11 on Support for President George W. Bush," *Personality and Psychology Bulletin* 30, no. 9 (2004): 1136-50; see also A. Rodriguez-Carballeira and F. Javaloy, "Psychosocial Analysis of the Collective Processes in the United States After September 11," *Conflict Management and Peace Science* 22, no. 3 (2005): 201-16.
[436] Karen Jones, "Trust and Terror," in Peggy DesAutels and Margaret Urban Walker (eds.), *Moral Psychology: Feminist Ethics and Social Theory* (Lanham, MD: Rowman & Littlefield, 2004), 10-15.
[437] Ibid. 10.
[438] Ibid.
[439] Wolfendale, 759.
[440] Ibid.
[441] Igor Primoratz, "What Is Terrorism?" *Journal of Applied Philosophy* 7 (1990): 129-138.
[442] Ibid.

It is not surprising that the fear of terrorism and the described dynamics of subjective threat perception have significant implications for the formulation of public policy. As Enemark has observed, differing sensibilities lead to discrimination in the way political leaders respond to threats.[443] At the international level, this was starkly illustrated by the UN Security Council's swift response the 9/11 attacks, in contrast to its prevarication over a series of massacres from April to July 1994 during which Rwanda experienced the equivalent of three 9/11 attacks every day for 100 days. Similarly, in the aftermath of 9/11, national governments moved quickly to allocate massive financial resources to "combating" international terrorism. These efforts have not been without criticism. As David Banks has noted, for example, "if terrorists force us to redirect resources away from sensible programs and future growth in order to pursue unachievable but politically popular levels of domestic security, then they have won an important victory that mortgages our future."[444] The financial implication notwithstanding, one may well argue that the political and psychological sensibilities surrounding terrorism, in combination with public demands for action, require democratic governments to respond. In fact, counter-terrorism measures may find much of their legitimacy in the support of the majority of the public (regardless of whether there is an objective threat in the first place). At the same time it is important to recognise that the support for such measures may be the result of a lack of basic knowledge among the public about the nature and scope of the terrorist threat. This possibility in turn makes it imperative that government exercise responsibility and restraint in the formulation of counter-terrorism law and policy, a requirement which further strengthens the case for an approach based on the proportionality principle.

III. The Threat of Terrorism to Australia

1. The Source of the Threat in the Australian Context

The findings of the previous section (II.) will now be applied to the threat in the Australian context. In particular, the "three circles of threat" framework will be employed to examine the sources of the terrorist threat to Australia. Given that the stated purpose of Australia's domestic counter-terrorism law and policy is to counter the domestic terrorism threat in Australia, particular focus will be given to the likelihood of a terrorism attack occurring on Australian soil. It is imperative to distinguish clearly between threats to Australian interests abroad and the threats to Australia's homeland as these threats may have entirely different sources. Moreover, this distinction needs to be drawn for

[443] Enemark, *Disease and Security*, 10.
[444] Quoted in Mueller, "Terrorism, Overreaction and Globalization," 55.

the purposes of conducting a proper proportionality analysis as it is doubtful that *domestic* counter-terrorism laws are a suitable means for addressing terrorist threats *abroad.*

The analysis of the terrorism threat to Australia is, of course, somewhat limited by the fact that it is entirely based on open-source material and information. Nonetheless, the absence of classified information does not invalidate the analysis of the terrorist threat *per se.* On the contrary, it is suggested that such analysis is possible without access to secret intelligence-based assessment. First, the assessment in this thesis does not concern itself with specific threats to specific targets but rather places the threat of terrorism in a broader context by examining whether the possibility of terrorism attacks – and even if they occur – pose a significant threat to Australia. Second, it is suggested that the legislative framework to counter terrorism ought not to be devised in response to specific threats but rather developed objectively so as to be capable of withstanding changes to the threat environment over time. It is a fundamental principle of good legislative policy to avoid developing reactive laws. Moreover, Parliament itself may not have access to all classified information relevant to, or necessary for an informed assessment of the nature and scope of the threat of terrorism. Even in cases where legislators have access to classified information, such information as well as their analysis may be inaccurate or misleading.[445] In fact, as far as international terrorism is concerned Australian intelligence agencies appear to rely heavily on information shared by their overseas partners. The reliability and quality of this information may well be inconclusive or uncertain as knowledge in the area of international terrorism generally continues to contain too many gaps to make any final determinations with any degree of certainty. This was acknowledged by ASIO itself with the agency stating that "even with additional resources, there can be no guarantees that intelligence always will be available that will allow us to prevent those who would do us harm from achieving their objectives."[446] For these reasons an academic assessment of the terrorism threat to Australia is amply justified.

a) Al Qaeda

The threat posed by Al Qaeda has readily been cited as a key feature of the contemporary threat of international terrorism (regardless of whether Al Qaeda is regarded as a group, network or an ideology). In Australia, too, threats from Al Qaeda featured prominently in public government assessments and statements.[447] For instance, the Deputy Director of ASIO, in a speech in September

[445] Intelligence assessments about WMD in Iraq are a case in point. See also Dennis M. Gormley, "The Limits of Intelligence: Iraq's Lessons," *Survival* 46, no. 3 (2005): 7-28.
[446] ASIO, *Report to Parliament 2005-06*, 3.
[447] See the discussion in Chapter 3 above.

2008, claimed that "there is no useful precedent (...) for the global violent jihadist movement, which is the most significant terrorist threat we face, and includes al-Qa'ida among others."[448] Consistent with the "three circles of threat" approach, this analysis will thus first focus on the threat arising from the core leadership of Al Qaeda, although most are relevant to an assessment which considers Al Qaeda an ideology rather than a terrorist group.

The threat that Al Qaeda poses to Australia seems rather low for a number of reasons. To begin with, Australia appears to a poor strategic choice and an unlikely target for an Al Qaeda-organised attack. Indeed, an attack on Australia's homeland appears to be of very little value to both Al Qaeda and the regionally-based Jemaah Islamiyah [hereinafter JI]. As Jason Burke and others have pointed out, a primary goal of Al Qaeda is to beat back what it perceives as the West's aggressive project of denigrating, dividing, and humiliating Islam – a project supposedly begun during the medieval Crusades and later periods of colonial rule.[449] Ultimately, Al Qaeda envisages the establishment of a single Islamic state, or "caliphate," in the lands roughly corresponding to the furthest extent of the historic Islamic empire. While geostrategic objectives form part of the Al Qaeda ideology, Islamist militancy is also notably driven by local grievances.

As Burke has stated, bin Laden's primary focus has always been to topple the regime in his homeland of Saudi Arabia.[450] However, when Islamist militants grew increasingly frustrated by their failure to change the domestic status quo in countries like Egypt, Saudi Arabia and Algeria, they turned their attention to striking at the Arab regimes' Western sponsors. As has been argued in Chapter 3 above, although Australia may qualify as Western country, it is rather improbable that it represents one of these e sponsors. Indeed, in contrast to the United States and other key Western powers like the United Kingdom, France, and Germany, Australia's political leverage in the Arab world is very limited. Given that Al Qaeda's planning and operational capabilities are relatively constrained, it is thus unlikely that the network would "waste" its limited resources on planning an attack on a rather low-profile target like Australia.

Australia is not only a bad strategic choice in general, but it also lacks significant symbolic targets on the ground. Symbolism and ideology play a crucial role in a terrorist group's target selection.[451] As C.J.M. Drake noted, ideology supplies terrorists with an initial motive for action and provides a

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[448] Deputy Director of ASIO, "Australia's Security Outlook," Security in Government Conference, 16 September 2008; <http://www.asio.gov.au/Media/Contents/sig_speech_2008.aspx>.
[449] Jason Burke, "Think Again: Al Qaeda," *Foreign Policy*, Iss. 142 (May/June 2004): 18-26. For in-depth analysis see also Jason Burke, *Al-Qaeda: Casting a Shadow of Terror* (New York: I.B. Tauris, 2003).
[450] Burke, "Think Again: Al Qaeda," 19.
[451] C.J.M. Drake, "The Role of Ideology in Terrorists' Target Selection," *Terrorism and Political Violence* 10, no. 2 (1998): 53-85.

prism through which they view events and the actions of other people. It also allows them to justify their violence by displacing the responsibility onto either their victims or other actors, whom in ideological terms they hold responsible for the state of affairs which the terrorists claim led them to adopt violence.[452] The 9/11 attacks, the Bali bombings, the Madrid atrocities and the London attacks are all cases in point.

The World Trade Center's twin towers represented America's overwhelming economic power; the Pentagon continues to symbolise American military domination. Similarly, symbolism played an important role in the Bali bombings. The night-clubs in Bali, a Hindu-dominated part of Indonesia, are regarded by Islamic radicals as places of "immoral behaviour" for Western tourists. What is more, Balinese tourism is seen as major source of revenue for the "corrupt" government in Jakarta. While the Madrid commuter trains did not represent any specific symbol themselves, Spain as a country did. It was in Spain that the greatest contest between Christianity and Islam was fought. This historical context of the clash of religions was expressly referred to in a note received by the Arabic newspaper *Al-Quds al-Arabi*. Claiming responsibility for the Madrid bombings the Brigade of Abu Hafs al-Masri stated explicitly that the attacks were "part of settling old accounts with Spain".[453] Similarly, the United Kingdom is considered to be the key ally of the United States as it has regularly contributed significantly to US military operations. Moreover, the United Kingdom has a considerable history as colonial power in the Middle East, South Asia and elsewhere.

Australia, however, does not have a comparable historical past, nor does it possess World Trade Center or Pentagon-like symbols. Granted, it has several recognisable landmarks like the Sydney Harbour Bridge, the Sydney Opera House or the Melbourne Cricket Ground. However, these targets have a little symbolical value and do not represent any aspect of Australia's foreign or defence policy. It is thus not surprising that Foreign Minister Alexander Downer has explicitly confirmed in late 2002 that up until that time, the Government had not received any specific intelligence information in relation to targets such as the Sydney Harbour Bridge, the Sydney Opera House, the Melbourne Cricket Ground or "whatever it may be."[454] It is interesting to note in this context that according to structural engineering experts the Harbour Bridge is one of the least vulnerable structural targets in Sydney anyway.[455]

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[452] Ibid, 54.
[453] "Al Qaeda linked to Madrid train bombings," *Sydney Morning Herald* (Sydney), 12 March 2004.
[454] Jonathan Pearlman, "Sydney Harbour Bridge 'too hard a target'", *Sydney Morning Herald* (Sydney), 28 November 2002.
[455] Ibid.

It is also true that Australia's overall risk profile has arguably increased as a result of several developments in the recent past. These include specifically Australia's active role in East Timor's struggle for independence in 1999, and Canberra's wide-ranging counter-terrorism cooperation with Jakarta since 2002.[456] It is likely that both developments have amplified animosity towards Australia among Islamist militants in Indonesia and elsewhere. Furthermore, it appears reasonable to suggest that Australia's relatively active role in the US-led global war on terrorism more generally, and Canberra's military commitment in Iraq and Afghanistan in particular, has contributed to a heightened overall risk profile. Nonetheless, it remains unclear whether these developments have had a significant direct impact on the threat level to Australia's homeland. For instance, Australia's contributions to the above mentioned campaigns have not been readily recognised in international media outlets. Moreover, as indicated earlier, it is simply impossible to gauge the impact of recent foreign policy choices on Australia's risk profile with any degree of accuracy. Interestingly, figures provided by ASIO suggest that no Islamist militants have attempted to travel to Australia recently. In 2006-07, for example, ASIO completed 53.387 security assessments in relation to individuals seeking entry to Australia and issued only seven adverse findings.[457] In 2007-2008, the number increased to 89.290 assessments but no adverse findings were made.[458]

b) Jemaah Islamiyah

In the Southeast Asia region, Jemaah Islamiya (JI) represents one of the groups that would classify as a group belonging to the second circle of threat. JI is commonly considered to be responsible for the attacks against two nightclubs on the Indonesian resort island of Bali on 12 October 2002, which killed over 200 people including 88 Australians. This attack confirmed terrorism's place at the centre of contemporary Australian politics as it was Australia's first (and only) experience with mass-casualty terrorism. Despite testimony from the ring-leaders of the terrorist attacks that they were targeting Americans and Westerners in general, a popular misperception in Australia was that the attacks were a deliberate strike against Australians.[459] And, as David Wright-Neville has noted,

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[456] The Australian Federal Police, for instance, played an important role in the investigation of the Bali bombing. Australia and Indonesia have also agreed to establish a joint counterterrorism center in Jakarta, to which Australia is contributing AU$ 26.6 million (US$19.3) over five years. See e.g. Janaki Kremmer, "Indonesia and Australia draw closer in terror fight," *Christian Science Monitor (Online)*, 13 September 2004.

[457] ASIO, *Report to Parliament 2006-07*, 30.

[458] ASIO, *Report to Parliament 2007-08*, 24.

[459] Sonny Inbaraj, "Bali attack directed at West, not Australia," *Asia Times (Online)*, 17 October 2002; <http://www.atimes.com/atimes/Southeast_Asia/DJ17Ae05.html>. Amrozi, the first of the Bali bombers to be arrested, has even told police that he was "surprised" that so many Australians were killed in the attack, as he thought the target was Americans. Ali Imron made similar remarks; Ali Imron said that he was not aware whether Australia was an ally of

the Australian government did not work to "disabuse Australians of this perception."[460] As a result, the Bali bombings triggered an important psychological reappraisal in Australia of national security threats and, as Carl Ungerer observed, Australians have been "more willing to accept the proposition that terrorism shifted from a nuisance criminal behaviour that predominantly affected parts of the Middle East, to an immediate security problem on Australia's doorstep."[461]

This proposition was actively advanced by the Howard government which repeatedly referred to the Bali bombings as evidence that the threat of terrorism had reached Australia.[462] Similar assessments were made by think tanks and scholars. A 2004 report by the Australian Strategic Policy Institute, for instance, concluded that Australia faced "an unprecedented risk from terrorism". While the report acknowledged that the Bali bombings "were not specifically directed against Australia, but rather were an attack against the West more generally," it nonetheless found that "JI would undoubtedly attack targets in Australia if it had the means and could find a suitable point of weakness."[463] This assessment encapsulated a widely held belief that Australia was at direct threat from JI as Al Qaeda's "local branch office" in Southeast Asia. It followed a general trend that described JI as an al-Qaeda-affiliate or some variation thereof.

Nevertheless, the assumption that JI represented Al Qaeda in Indonesia, or the Southeast Asian region more generally, is inaccurate and misleading. As Sidney Jones, an Indonesia specialist from the International Crisis Goup, has noted:

> JI was never an al-Qaeda franchise; there were always parts of JI that objected to the bin Laden interpretation of jihad, at least as it applied to Southeast Asia; and it is misleading to portray the relationship between al-Qaeda and JI as a constant, when both organisations have had to adjust to post-11 September realities.[464]

In an earlier publication, Jones described the relationship between Al Qaeda and JI as comparable to that of a non-governmental organization with a funding agency.[465] However, even this characterisation may suggest links between JI and Al Qaeda that do not necessarily exist in practice. Imam Samudra, one of the JI operatives responsible for the Bali bombings, for instance, was

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America or not "Bali suspect re-enacts bombings", *BBC News Online*, 11 February 2003, <http://news.bbc.co.uk/2/hi/asia-pacific/2747519.stm>.

[460] David Wright-Neville, "Fear and Loathing: Australia and Counter-Terrorism," Real Instituto Elcano (21 December 2005) 3.

[461] Ungerer, "Australia's policy responses to terrorism in Southeast Asia," 196.

[462] See, e.g., 2004 White Paper, vii, 13.

[463] Australian Strategic Policy Institute, *Beyond Baghdad: ASPI's Strategic Assessment 2004* (Canberra: ASPI, 2004) 10.

[464] Sidney Jones, "The Changing Nature of Jemaah Islamiyah," *Australian Journal of International Affairs* 59, no. 2 (2005): 172. See also International Crisis Group, *Al Qaeda in Southeast Asia: The Case of the "Ngruki Network" in Indonesia,* Asia Briefing (8 August 2002, reissued 10 January 2003); International Crisis Group, *Jeemaah Islamiyah in South East Asia: Damaged but Still Dangerous*, Asia Report No. 63, (26 August 2003), p. 30

[465] International Crisis Group, *Jeemaah Islamiyah in South East Asia*, 30.

interviewed by the *London Times* newspaper journalist Michael Sheridan in 2008. Asked whether there were any financial links between his group and Al Qaeda, Samudra stated:

> It's not correct. The money was not from Osama [bin Laden] it was from other people. This is an important point. Maybe some try to make a link between Al Qaeda and us. Now I don't know about this. We are not linking. The only link is iman (faith), the only link is aqida (creed) because Osama's God is Allah and my God is the almighty Allah. His mission is similar to my mission to help Muslims around the world. You get the point? Right.[466]

Likewise, it is highly questionable whether JI poses a direct threat to Australia (as opposed to a threat to Australian interests in Indonesia or Southeast Asia). For example, an attack by JI on Australian soil seems unlikely because it would not fit the group's political agenda. JI's principal objective has always been the establishment of a fundamentalist Islamic government in Indonesia, a goal that has been described as the "one constant of the organisation since the beginning." It has also been suggested that the establishment of fundamentalist Islamic government in Indonesia would ultimately be followed by the formation of a unified Islamic state in the South East Asian region. This state or "caliphate" would stretch from southern Thailand, through the Malay Peninsula (including Singapore), across the Indonesian archipelago and into the southern Philippines.[467] However, such claims are problematic. As Jones has pointed out:

> The assumption that JI's main objective was an Islamic state in archipelagic Southeast Asia (daulah Islamiyah Nusantara) comes from looking at the organisation at a particular time and place: Singapore and Malaysia in 2001. In June 2001, the Malaysian government accused Abu Jibril, a close associate of Abu Bakar Ba'asyir, of working for the creation of such a state, and some of the Singaporean detainees arrested in late 2001 told their interrogators that this indeed was the organisation's goal. This information was then published in the Singapore White Paper in early 2003, a widely used source for everyone writing on terrorism in Southeast Asia, and so became an established 'fact'.[468]

Even if one accepts that the establishment of a unified Islamic state in the South East Asian region is part of JI's objectives, it is unclear whether this would include parts of Northern Australia. Furthermore, it remains remain questionable how attacks on Australian soil would further any of these aims. In fact, while attacks on Australian interests in Indonesia and elsewhere in Southeast Asia may appear "beneficial" for they could be regarded as chasing Western "infidels" from "Islamic land", it is difficult to see how an attack inside Australia would yield similar "profits." These strategic and theoretical considerations notwithstanding, there is also little evidence to

[466] "Extracts: Michael Sheridan interview with Bali bomber Imam Samudra," *The Sunday Times* (London), 2 March 2008.
[467] See, e.g., Brek Bately, *The Complexities of Dealing with Radical Islam in Southeast Asia: A Case Study of Jemaah Islamiyah*, Canberra Papers on Strategy and Defence No. 149 (Canberra: SDSC/ANU, 2003).
[468] Jones, "The Changing Nature of Jemaah Islamiyah," 170-71.

suggest that JI set up operations in Australia in practice. In particular, available information indicates that even modest attempts to raise funds in Australia for activities in Indonesia have been unsuccessful.

In late November 2003, the CIA, acting as interrogator for the Australian Federal Police and ASIO, intensively questioned top terrorist suspect Riduan Isamuddin about JI's intentions in Australia. Isamuddin, also known as Hambali, is believed to be the Asian point man for Al Qaeda and the operations chief of JI.[469] His responses to more than 200 questions concerning Australia reaffirmed a belief by both agencies that the JI cell covering Australia, known as Mantiqi 4, was the least developed and operationally capable of JI's four regions.[470] It appears that Hambali had no success in establishing a local Anglo-Saxon network and instead relied on two Indonesian brothers, Abdul Rahim Ayub and Abdul Rahman Ayub. However, the Ayubs' duties extended no further than fundraising and instilling the fervor of JI teachings, including those of firebrand cleric Abu Bakar Bashir.[471] Analysts from the International Crisis Group have reached a similar conclusion. A report released by the organization in February 2004 downplayed the importance of Australia to JI, saying the so-called Mantiqi 4 operations group to be set up by Ayub was "never really a going concern," although "Australia continued to be seen as a fund-raising area."[472]

The story of the Ayub brothers is in itself an example of Islamic radicals failing to establish a terrorist network inside Australia. Abdul Rahim Ayub, a graduate of the infamous Ngruki School founded by radical Muslim cleric and alleged JI spiritual leader Abu Bakar Bashir, arrived in Australia in the mid-1980s. Ayub first moved to Melbourne and subsequently settled in Dee Why on Sydney's northern beaches.[473] In 1998, with the construction of a new mosque for the local community in Dee Why, Abdul Rahim and fellow extremists planned to take over the place of worship. It appears that Abdul Rahim's intention was to use the new mosque as a base for the expansion of JI's influence and support in Australia.

The bid to take over the mosque was fuelled by the arrival in Australia of Abdul Rahim's twin brother, Abdul Rahman Ayub who is a militant cleric and veteran of the Islamic holy war in Afghanistan.[474] However, the Ayub brothers met with stiff resistance from the local Muslim

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[469] Hambali was arrested by Thai and US authorities in Thailand in mid-August 2003 and transferred to "Camp Justice" on Britain's Diego Garcia, a tiny island in the Indian Ocean.
[470] Martin Chulov, "Hambali wait finally pays off," *The Australian* (Sydney), 24 January 2004.
[471] Martin Chulov, "Hambali wanted to attack Australia," *The Australian* (Sydney), 23 January 2004.
[472] International Crisis Group, *Indonesia Backgrounder: Jihad in Central Sulawesi*, Asia Report No. 74, (3 February 2004) 2.
[473] ABC, TV Programme Transcript, Four Corners, "The Australian Connections," 10 June 2003; <http://www.abc.net.au/4corners/content/2003/transcripts/s878332.htm>.
[474] Ibid.

community. Zainal Arifin, the imam of the Dee Why community, particularly opposed the presence of the extremists in the mosque. The conflict escalated and Zainal was physically attacked by the Ayub group. Subsequently, the imam went to court and obtained an apprehended violence order. The pair was then forced to leave Dee Why and moved to Perth.[475] Abdul Rahman applied for refugee status but lost his case in the Refugee Review Tribunal and was deported in 1999. Abdul Rahim left Australia for Indonesia in September 2002. Indonesia's national intelligence agency, BIN, located Abdul Rahim in West Java in early 2004. However, according to Indonesian officials neither Abdul Rahim Ayub, nor his twin brother Abdul Rahman, have been linked to any terrorist act in Indonesia or raised the interest of Indonesian counter-terrorism police.[476]

To sum up, it is highly questionable whether JI poses a direct threat to Australia's mainland. While attacks against Australian interests in Indonesia or Southeast Asia may appear attractive for JI, an attack on Australian soil seems unlikely because it would not fit the group's principal objective which continues to be the establishment of a fundamentalist Islamic government in Indonesia.

c) Home-grown Terrorism

The third circle of threat is considered to consist of individuals commonly referred to as "home-grown" terrorists. In Australia, too, there is concern that individuals professing to act in the name of Al Qaeda could launch attacks. To this date, however, there have not been any such attacks in Australia. Furthermore, there is little evidence to suggest that any "terrorism-related" preparatory activities by individuals reached the stage of selecting targets for an attack. Nonetheless, some commentators have raised alarm and warned that home-grown terrorism constitutes an unprecedented threat. Rohan Gunaratna, for instance, speaking on Australian television in 2007, claimed that:

> Since 9/11, the threat of international terrorism to Australia has been surpassed by the threat of homegrown terrorism. Today, homegrown terrorists present the biggest security challenge to Australian law enforcement and to security and intelligence services.[477]

The Deputy Director-General of ASIO, in September 2008, has also warned that "terrorism-related activity continues to take place in Australia" and that the agency was "aware of Australians who hold extremist views, including some who have trained overseas with terrorist groups, or engaged in

[475] Ibid.
[476] Martin Chulov, "Indonesian agents track down JI's Australian 'leader'," *The Australian* (Sydney), 16 July 2004.
[477] Rohan Gunaratna, "Homegrown terrorism," *ABC News (Online)*, 5 June 2007.

jihad activities".[478] However, the number of persons holding "extremist" views – something that does not necessarily mean that they are prepared to resort to violence – is very low. As the Director-General of ASIO noted in 2007, "clearly, the number of people who operate within, or are dawn to, this mindset is a very small proportion of the population."[479] A similar assessment can be found in ASIO's 2007-08 Report to Parliament:

> Within Australia, a small but significant minority of the community hold or have held extremist views. An even smaller minority is prepared to act in support of it – including by advocating violence, providing logistical or propaganda support to extremists, or travelling abroad to train with terrorist groups or participate in violent jihad activities.[480]

It is thus not surprising, perhaps, that the threat of home-grown terrorism found little or no mentioning in ASIO's public reports published prior to the 2005. It was only in the aftermath of the 2005 London bombings that home-grown terrorism was explicitly referred to as a key aspect of the terrorism threat to Australia. What ASIO or the Australian government did not explain, however, was how exactly the London attacks had changed the level or nature of threat of terrorism in Australia, or whether indeed there was any evidence to suggest that the threat scenario in Australia was comparable to the United Kingdom's. In fact, a comparison with the situation in the United Kingdom may lead to conclusion that there threat in Australia is minimal. In contrast to the United Kingdom, there is little evidence of a significant radical Islamic faction within Australia's small Muslim community which numbers only 300,000 people out of a total national population of around 20 million, or 1.5% of the total population.[481]

Further evidence that may be regarded as an indication that the threat of home-grown terrorism is perhaps overstated is available from the trial of Jack Roche. A British born Muslim-convert from Perth, Roche was convicted on charges of conspiring to damage the Israeli embassy in Canberra June 2004. The Roche case demonstrates, however, that attempts to recruit even a small cell of Islamist sympathizers failed. In 2000, Roche allegedly met with JI operative Hambali and bin Laden's alleged deputy, Abu Haifs. He was told to conduct surveillance on possible Israeli and US targets in Australia and to recruit an "operational cell" of three to four Australians.[482] However, after failing to recruit even a small group, Roche abandoned his plans and tried to contact ASIO. At that time ASIO did not respond. Two years later, in late 2002, Roche was tracked down by a

[478] Deputy Director of ASIO, "Australia's Security Outlook," Security in Government Conference, 16 September 2008.
[479] Paul O'Sullivan, "National Security Intelligence and Counter-Terrorism," Australian National Security Conference 2007, Canberra, 27 February 2007.
[480] ASIO, *Report to Parliament 2007-08*, ix.
[481] Wright-Neville, "Fear and Loathing: Australia and Counter-Terrorism," 3.
[482] "Terrorist wannabe who decided staying asleep was the better option," *Sydney Morning Herald* (Sydney), 27 November 2002.

reporter of *The Australian* and subsequently gave a series of taped interviews. These interviews provided the basis for ASIO raids on Roche's home in Perth and later charges laid by the police. Asked about possible recruitment efforts Roche stated that he had "put out some feelers" but that the whole operation turned out to be "a very difficult task" because "nobody in Australia was interested at all."[483]

In order to underline the threat of home-grown terrorism in Australia, the ASIO annual reports to Parliament commonly point to the legal proceedings against a number of individuals charged with terrorism-related offences. These proceedings do shed some light on the nature and significance of the threat faced in Australia. However, rather than demonstrating the severity of the threat, the criminal proceedings that have been concluded so far do not suggest that home-grown terrorism constitutes an issue of grave concern. In fact, the majority of cases have resulted in the defendants' acquittal of terrorism-related charges.

The case of Zaki Mallah, the first person to be charged with a terrorism offence in Australia, is particularly illustrative as it demonstrates the potential gap which can exist between "extremist views" on the one hand and the carrying out of violent action on the other. In 2003, Mallah received an adverse ASIO security assessment and was not permitted to renew his Australian passport. He thereafter recorded a video message in which he set out a plan to kill ASIO and DFAT officials. This message was sold to an undercover officer posing as a journalist. Jihadi material and a gun were also found in Mallah's house. Mallah was charged with two counts of doing an act in preparation for a terrorist act – one count related to his possession of a gun and the other to his recording of a threatening video message.[484] However, he was acquitted of both counts. The sentencing judge, Chief Justice Wood, concluded that:

> The prisoner was an idiosyncratic, and embittered young man, who was to all intents something of a loner, without significant prospects of advancing himself..... While I accept that the Prisoner enjoyed posing as a potential martyr, and may from time, to time, in his own imagination, have contemplated creating a siege and taking the lives of others, I am satisfied that in his more rational moments he lacked any genuine intention of doing so.[485]

Other illustrative cases include the cases of John Amundsen and Jack Thomas. In 2005 Amundsen made threats to Queensland police to expect an Al Qaeda style attack in Brisbane. He was subsequently found in possession of 53 kilograms of explosive "powergel" in addition to four

[483] "Roche 'lost interest' in bombing," *Sydney Morning Herald* (Sydney), 27 May 2004.
[484] *Criminal Code Act 1995* (Cth) s 101.6(1).
[485] *R v Mallah* [2005] NSWSC 317 at [38].

homemade bombs, ten detonators and a book about Osama Bin Laden. Amundsen was charged with "making a thing (explosive devices) connected with preparation for a terrorist act[486] and with a range of offences under Queensland law, including buying explosives dishonestly, using a carriage service to make a threat to kill, possessing a false passport, and counterfeiting Australian banknotes. However, in 2007, the terrorism-related charge was dropped after Amundsen admitted that his plan was to detonate bombs outside his girlfriend's house to win back her love.

Joseph "Jack" Thomas may not have been quite as romantic. His charges related to allegations that he trained with Al Qaeda in Afghanistan. Thomas – nicknamed "Jihad Jack" by the media – allegedly also received money, an airplane ticket and a falsified passport from a senior Al Qaeda operative. He was convicted for "intentionally receiving funds from a terrorist organisation (Al Qaeda)[487] and for "possessing a falsified passport"[488] while acquitted on two counts of intentionally providing support to a terrorist organisation. However, the convictions were overturned on appeal on the basis that admissions he made in Pakistan in March 2003 had not been voluntary. Thomas was subsequently retried after he had given an interview on Australian television in which he discussed his involvement with the Taliban and Al Qaeda. Nonetheless, in 2008 he was acquitted again of the terrorism-related charge but convicted for possessing a falsified passport.

One of the few cases that did result in the conviction of the defendant on terrorism charges was the case of Faheem Lodhi. The charges against Lodhi related to allegations that he had taken aerial photos of Australian Defence Force establishments, possessed a document about how to make bombs, had collected maps of Sydney's electrical supply system and had sought information about the availability of materials for making bombs.[489] In 2006 Lohdi was subsequently convicted for "possessing a thing (document about how to make bombs) connected with preparation for a terrorist act",[490] "collecting documents (maps of the Sydney electrical supply system) connected with preparation for a terrorist act",[491] and for "doing an act (seeking information about the availability of materials used to make bombs) in preparation for a terrorist act".[492] He was sentenced to 20 years imprisonment, with a 15 year non-parole period. While he repeatedly maintained his innocence – stating that killing innocent people was not part of Islam – his appeal against conviction and sentence was dismissed in 2007.

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[486] *Criminal Code Act 1995* (Cth) s 101.4.
[487] *Criminal Code Act 1995* (Cth) s 102.6(1).
[488] *Passports Act 1938* (Cth) s 9A(1)(e).
[489] Natacha Wallace, "Lodhi guilty of terror plot," *Sydney Morning Herald* (Sydney), 19 June 2006.
[490] *Criminal Code Act 1995* (Cth) s 101.4(1).
[491] *Criminal Code Act 1995* (Cth) s 101.5(1).
[492] *Criminal Code Act 1995* (Cth) s 101.6.

Another case that resulted in the conviction of some of the accused is the so-called Benbrika trial. In November 2005, a joint operation of the New South Wales, Victorian and Federal police (Operation Pendennis and Operation Hammeru) had culminated in raids of houses Melbourne and Sydney and the arrest of 13 men in Melbourne. The men were alleged to be part of a terrorist group that planned to wage holy jihad against the Australian government with the intention of coercing it to withdraw from Iraq. The group was led by Abdul Nacer Benbrika, the alleged spiritual leader. Benbrika was well known to ASIO in the lead up to the arrests. During 2004 and 2005 he had been under surveillance as a possible instigator of terrorist acts. In March 2005 his passport was withdrawn on advice from ASIO and agents raided his Melbourne home in June. Benrika had also appeared on national radio and television praising Osama bin Laden a "great man" – hardly the sort of bevaviour of someone secretly preparing a large scale terrorist attack.

Benbrika and other members of the group were charged with a range of offences including membership in a terrorist organisation, preparation for a terrorist act, and providing funds to a terrorist organisation.[493] In addition, Benbrika was charged with directing the activities of a terrorist organisation. In late 2008, seven of the men, including Benbrika, were subsequently convicted of some of the terrorism-related charges. The seven convicted men have all lodged appeals against their convictions and sentences. In his judgment, Justice Bongiorno noted that "terrorist acts as they have been experienced in modern times are often carried out by amateurs whose principal attribute has not been skill, but rather zealous or fanatical belief in some ideology or other which seeks to promote itself by the use of violence."[494] According to Bongiorno "Benbrika clearly had such a belief and fanaticism and imparted it to his young associates."[495] Nevertheless, the judge accepted that Benbrika had no military or terrorist training. Moreover, the Court found no evidence to suggest that the group had a firm target or that they had obtained explosives or weapons.[496]

The above cases appear to confirm ASIO's assessment that there is a small number of Australians who "hold extremist views." Nonetheless, it is important to keep this assessment in perspective. The situation in Australia, for instance, is hardly comparable to the conditions and dynamics in the United Kingdom, France, Spain, and other parts of Europe. The above cases also demonstrate that extremist views do not necessarily lead to violent action. Even in the cases that resulted in conviction of the accused, none of the penalised actions amounted to immediate preparatory action

[493] All 12 men charged with intentionally being a member of a terrorist organisation (s 102.3 of the *Criminal Code Act 1995* (Cth)); Four men (Joud, Ahmed Raad, Sayadi and Merhi) charged with intentionally providing resources to a terrorist organisation (s 102.7(1)); Six men (Joud, Ahmed Raad, Ezzit Raad, Bassam Raad, Taha and Shoue Hammoud) charged with attempting (s 11.1) intentionally to make funds available to a terrorist; Benbrika charged with intentionally directing the activities of a terrorist organisation (s 102.2(1)).
[494] Gary Hughes, "Terror leader Benbrika to serve at least 12 years in jail," *The Australian* (Sydney), 3 February 2009.
[495] Ibid.
[496] Ibid.

for a terrorist act. Moreover, none of the prosecuted individuals' actions had progressed to a stage where possible targets for attacks were identified. This does not mean, of course, that the penalised actions as well as certain individuals do not pose any threat whatsoever. It only takes a few determined individuals to launch a terrorist attack. However, it remains questionable whether the small number of "extremists" who are ready to employ violence can be considered an unprecedented threat to Australia's national security.

2. The Objective Dimension of the Threat

It has been argued that the threat of terrorism in Australia stems predominantly from so-called home-grown jihadists. But what is the objective dimension of this threat? And who or what is threatened? According to ASIO, "the threat within Australia has remained largely unchanged since late 2001 – a terrorist attack is feasible and could well occur."[497] Moreover, the agency's 2007-2008 annual report to Parliament claimed that this threat "has posed the most significant security threat to Australia for at least the last seven years" and that "it will continue to do so for the foreseeable future."[498] Similarly, the Director-General of ASIO was convinced that "if not for the action of ASIO and its partners in recent years (...) there would have been a terrorist attack or attacks in Australia."[499] This underlined – "in very clear terms – the seriousness of the threats we face, the importance of the work we do and the criticality of our partnerships."[500]

ASIO's rather alarmist assessments are, perhaps, not all that surprising. It is certainly illustrative to read them against the background of the agency's rapid expansion since 9/11. ASIO's budget, for instance, rose from A$ 62.7 million in 2001 to A$ 304 million in 2008 (a 485% increase). The current Forward Estimates show the budget continuing to grow to A$ 417 million by 2011–12 (a 665% increase since 2001). Similarly, staff numbers increased by 266 % from 560 employees in 2001 to 1492 employees in 2008 and ASIO remains confident it will achieve its target of 1,860 by 2010–11 (a 332% increase since 2001). The increase in staff and budget may well reflect a perception that terrorism indeed poses a significant threat to Australia. However, at the same time it is not entirely irrational to point out that ASIO may have a vested interest in a sustained threat from terrorism. The above figures indicate that a large number ASIO analysts and agents would not be employed by ASIO if it were found that the threat of terrorism was overstated (and if ASIO did not have other work for them to do, of course). ASIO's declared "overwhelming priority", after all,

[497] O'Sullivan, 2007.
[498] ASIO, *Report to Parliament 2003-04*, ix.
[499] Ibid, vii.
[500] Ibid.

continues to be countering "the persistent terrorist threat from extremists."[501] This is not to suggest that ASIO's threat assessments are necessarily driven by budgetary considerations. Nonetheless, it seems at least conceivable that ASIO's management, when submitting annual reports to Parliament, is mindful of the fact that resource allocations may be linked to the assessed level of terrorist threat.

ASIO's parliamentary reports have readily portrayed terrorism as the "most significant" threat to Australia. At the same time the reports have been considerably vague in explaining why Australia is threatened by terrorism or what and who exactly is under threat. In 2008, the Deputy Director-General of ASIO noted that "if undetected and unchecked, extremists have the potential to threaten vital national infrastructure and the safety of Australians in Australia as we go about our everyday lives."[502] ASIO's 2007-2008 report to Parliament is equally imprecise in stating that "tactically, the threat is manifest in attacks against civilians as well as governments, while strategically it aims to influence and degrade institutions and principles that are fundamental to Australia's social, economic and security interests.[503] In order to underline this assessment, the report listed terrorism-related incidents affecting Australians – incidentally none of which occurred on Australian soil:

> Globally, in 2007–08, terrorist attacks or incidents affecting Australian civilians included:
>
> - on 10 July 2007, private security contractor Darryl de Thierry died in Iraq as a result of an improvised explosive device (IED) attack;
>
> - on 14 January 2008, the Serena Hotel in Kabul, Afghanistan – the temporary home of the Australian Embassy – was attacked by Islamic militants; and
>
> - on 29 April 2008, an Australian journalist travelling in a police convoy in Nangharar Province, Afghanistan, was injured by a suicide bomber. At least 18 Afghans were killed and 35 injured.
>
> Additionally, four members of the Australian Defence Force were killed during counter-terrorism related operations in Afghanistan

One may argue that these figures alone indicate that the threat of terrorism to Australia is rather low. However, it is generally difficult to see how the threat of international terrorism poses a threat

[501] ASIO, *Report to Parliament 2006-07*, 21.
[502] Deputy Director-General, 2008.
[503] ASIO, *Report to Parliament 2007-08*, 4.

to safety and individual physical integrity of Australians "as they go about their everyday lives". For example, the number of Australians killed in recent terrorist attacks is very low. Three Australians died in the 9/11 attacks.[504] Eighty-eight Australians died in the 2002 Bali bombings. By comparison, in the same year almost 20 times more Australians died in road accidents and around more than four times died in reported murders.[505] To this date, not a single person has been killed or injured by a terrorist attack on Australian soil since the Hilton bombing in 1978.

It is also highly questionable whether terrorism constitutes a significant threat to other key Australian interests. In particular it is difficult to see how the current threat could degrade institutions and principles that are fundamental to Australia's social and economic stability. This was also recognised by Peter Varghese, the then Director-General of the Australian Office of National Assessments, who pointed out that:

> Islamist terrorism has in-built limits as a strategic threat to Australia. It has little scope to endanger the existence of, or take territory from, the Australian state. Nor will terrorism threaten Australia's fundamental freedom of action to the extent that might, for example, coercion by an economically or militarily powerful state. Islamist terrorism in Southeast Asia will remain a danger (...) but thanks to the efforts of Indonesia and other regional states it is probably a diminishing danger as the strengthened capability of regional law enforcement agencies keeps the pressure on Jamaah Islamiyah.[506]

Similarly, John Edwards, Chief Economist at HSBC in Australia, "had difficulty thinking up plausible, grave threats the global economy might present to the Australian economy."[507] He thought of "mentioning terrorism, financial collapses, unprecedented imbalances, assets price bubbles, wars and oil prices, but in all categories the global economy has been there, done that, and kept going."[508] Analysts from the World Market Research Centre reached a comparable conclusion. They created a system that ranked 168 countries according to their vulnerability to terrorist attacks.[509] The survey ranked countries according to motivation, capability and presence of terrorist groups in the region, the effectiveness of anti-terrorism forces and scale of the potential damage.

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[504] See, e.g., Sharon Pickering, Jude McCulloch, David P. Wright-Neville, *Counter-Terrorism Policing* (New York: Springer, 2008) 36.
[505] Sarah Stephen, "Terrorism: Governments Fuel Fear," in Justin Healey (ed.), *Terrorism* (Balmain, NSW: Spinney Press, 2004), 39.
[506] Peter Varghese, "Australia's Strategic Outlook: A Longer-Term View," Speech by the Director-General of the Office of National Assessments, Security in Government Conference, Canberra, 5 December 2007, <http://www.ag.gov.au/www/agd/agd.nsf/Page/National_securitySecurity_In_Government_Conference2007#speeches>.
[507] John Edwards, "Global Economic Threats to Australia: Been There, Done That," *Security Challenges* 1, no. 1 (2005): 5-6.
[508] Ibid.
[509] Trudy Harris, "No. 38 on the Terror List," *The Australian* (Sydney), 20 August 2003.

Australia was ranked 38 lagging well behind the US and Britain, which ranked 4th and 10th, respectively.[510]

3. Subjective Threat Perception

It has been argued that terrorism poses a rather insignificant threat to Australia objectively. This assessment, however, is at odds with how the threat is perceived subjectively by the Australian public. In light of the Howard government's heavily-publicised campaign to promote "public awareness" on "terrorism" and "national security", it is perhaps not surprising that a large majority of Australians indeed believe that a devastating terrorist attack in Australia is only a matter of time. According to an opinion poll published by the *Sydney Morning Herald* in late April 2004, for example, 68 per cent of Australians expected that terrorists will strike Australia before too long.[511] In late 2007, 66 per cent were "concerned" that there will be "major terrorist attack on Australian soil in the near future."[512]

Figures from the annual opinion poll conducted on behalf of the Lowy Institute for International Policy contained similar findings. In 2006, for instance, global warming, international terrorism and the possibility of unfriendly countries becoming nuclear powers, were the top-rated threats to Australia's vital interest.[513] 74 per cent of respondents regarded "combating international terrorism" as a "very important" policy goal with 73 per cent considering "international terrorism" a "critical' threat".[514] Similarly, in 2007, 65 per cent of respondents considered combating international terrorism' "very important" while 26 per cent regarded it as "fairly important".[515] 38 per cent were "very worried" about the threat of terrorism while 30 per cent were "fairly worried".[516]

In the 2008 poll, "combating international terrorism" remained one of the most important policy goals (72 per cent).[517] While the "increasing scarcity of water" (not asked in 2006) was seen by the largest number of respondents (83 per cent) as a "critical threat", "international terrorism" (66 per

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[510] The 10 most vulnerable countries are Colombia, Israel, Pakistan, the US, The Philippines, Afghanistan, Indonesia, Iraq, India and Britain. Australia scored highly for motivation because of its commitment to the US-led war on terror and participation in the wars in Afghanistan and Iraq.
[511] "Australians expect terrorist strike", *Sydney Morning Herald* (Sydney), 21 April 2004.
[512] "Terrorism still seen as a threat by Aussies," *The Australian* (Sydney), 19 August 2008.
[513] Ivan Cook, *Australia, Indonesia and the World - The Lowy Institute Poll 2006* (Sydney: Lowy Institute, 2006) 2.
[514] Ibid, 9-11.
[515] Allan Gyngell, *Australia, Indonesia and the World - The Lowy Institute Poll 2007* (Sydney: Lowy Institute, 2007)19.
[516] Ibid, 22.
[517] Fergus Hanson, *Australia, Indonesia and the World - The Lowy Institute Poll 2008* (Sydney: Lowy Institute, 2008) 5.

cent) tied for equal second place with "global warming" (66 per cent).[518] Looking at changes since 2006, the biggest move came from those seeing "Islamic fundamentalism" as a "critical threat" which dropped 12 points from 60 per cent in 2006 to 48 per cent in 2008.[519] Interestingly, concern over Islamic fundamentalism rose with age, with respondents aged 60 years or over three times more likely than those aged 18-29 to say "Islamic fundamentalism" is a "critical threat" (66 per cent to 22 per cent).

The above figures demonstrate that in spite of the low objective probability of a terrorism attack occurring on Australian soil, the threat of terrorism has been a key concern to the Australian public. Furthermore, the poll results indicate that approximately two thirds of Australians continuously considered counter-terrorism as a very important policy goal. It is conceivable, of course, that the Howard government's heavily-publicised campaign to promote "public awareness" on "terrorism" and "national security" contributed to the development of that perception. Indeed, as will be shown in the next Chapter, the government has repeatedly sought to capitalise politically on the threat of terrorism. Nonetheless, regardless of the origins of the public perception of the threat, it arguably provided a political imperative for the Australian government to respond and to develop an appropriate counter-terrorism strategy. However, the public demand for action ought not to have outweighed an objective assessment of the threat. It is thus suggested here that the low objective threat of terrorism to Australia made it essential to develop proportionate and well-calibrated counter-measures.

IV. Implications for Counter-Terrorism Law and Policy

It has been argued that the objective threat of terrorism to Australia is rather low and that it is unlikely to endanger Australia's key interests. Yet, the Australian public's concerns over the threat are substantial and can hardly be ignored by a democratic government. This divide between the objective and subjective dimensions of the threat, however, has significant implications for the development and implementation of Australian counter-terrorism law and policy.

At the outset it needs to be recognised that – to date – there has not been any attack on Australian soil since the Hilton bombing of 1978. This means that that the development of any counter-terrorism law and policy in Australia is based on hypothetical possibilities. It is beyond question that it is *possible* that a single terrorist attack could result in the deaths of a significant number of

[518] Ibid.
[519] Ibid.

Australians. But the question is whether the existence of a *possible* threat – the likelihood of which is questionable – can justify the adoption of counter-terrorism law and policy that leads to an *actual* infringement of civil liberties. In order to realistically assess the terrorist threat to Australia it is not enough to show that a threat exists and may continue to exist in the future. As Jessica Wolfendale has noted:

> Justifying radical counterterrorism measures and massive counterterrorism budgets requires more than postulating possibilities; it requires a clear assessment of the likelihood of the possibility occurring, particularly compared to the likelihood of other future threats. Merely claiming that terrorists *could* perform an act of super-terrorism because the means for such an act (e.g., weapons and biological pathogens) are available is a truism, not a threat assessment.[520]

Accordingly, it is suggested that that a number of key questions need to be asked in the context of examining counter-terrorism law and policy options. As risk analyst Howard Kunreuther has argued, careful discussion of these issues requires asking:

- How much should we be willing to pay for a small reduction in probabilities that are already extremely low?

- How much should we be willing to pay for actions that are primarily reassuring but do little to change the actual risk?

- How can measures such as strengthening the public health system, which provide much broader benefits than those against terrorism, get the attention they deserve?[521]

These questions form an integral part of an analysis based the principle of proportionality as set out in Chapter 1 of this thesis. This principle requires establishing whether the domestic counter-measures adopted by the Australian government in the aftermath of 9/11 were suitable, necessary and strictly appropriate to address the threat. These measures will now be subjected to closer examination.

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[520] Wolfendale, 757.
[521] Howard Kunreuther, "Risk Analysis and Risk Management in an Uncertain World," *Risk Analysis* 22, no. 4 (2002): 655-64.

5

THE AFTERMATH OF 9/11 AND THE INTRODUCTION OF UNPRECEDENTED LAWS

I. Introduction

II. The Need for Anti-Terrorism Legislation

III. The Introduction of Unprecedented Laws

1. The Security Legislation Amendment (Terrorism) Act 2002 (Cth)

    a) The Definition of "Terrorist Act"
    b) Ancillary Offences
    c) The Definition and Proscription of a "Terrorist Organisation"
    d) Terrorist Organisation Offences
    e) Parliamentary Review
    f) Proportionality

2. The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 (Cth)

    a) The Detention and Questioning of Non-suspects
    b) The Detention and Questioning of Children
    c) The Lack of Judicial Review and the Severe Restriction of Legal Representation
    d) The Privilege against Self-incrimination
    e) The Prohibition to Disclose Information
    f) Parliamentary Review
    g) Proportionality

IV. Conclusion

I. Introduction

In the weeks preceding 9/11, John Howard's Liberal-National coalition was locked in a hard-fought campaign to win a third-term in federal office. By late August 2001, the prospects were not looking promising. Over the past three years, public support for the Australian Labor Party had continuously risen. At the state level, Labor had won the elections in Tasmania in 1998, and in New South Wales and Victoria in 1999. It had been re-elected in a landslide in Queensland in February 2001, and had won office in Western Australia a few days later. At the federal level, the Liberal Party had lost a traditional electorate, Ryan in Queensland, in a by-election and, in July 2001, had suffered a four per cent swing against it in a by-election in the Victorian electorate of Aston. In August 2001, the results of the state election in the Northern Territory brought more bad news for the Coalition with Labor winning office in Darwin for the first time in history. Against the backdrop of this tide in support for Labor the Coalition was under intense pressure to identify campaign themes that resonated with the Australian electorate and enabled the Government to reverse the trend in the federal election.

One such theme was the issue of border protection, which became a centrepiece of the Coalition's 2001 election campaign. Border protection as well as political and social issues related to the arrival of "illegal immigrants" and asylum seekers on Australia's northern shores had long been a subject of public concern in Australia. In the lead up to the federal election, two incidents brought these issues back into stark relief: the Tampa incident[522] and the Children Overboard affair.[523] These incidents involved the rescue of sea-faring refugees from distressed fishing vessels off Christmas

[522] In late August 2001, the Howard Government refused permission for the Norwegian freighter MV Tampa, carrying 438 asylum seekers rescued up in international waters, to enter Australian waters. This triggered an Australian political controversy in the lead up to a federal election, and a diplomatic dispute between Australia and Norway. When the Tampa entered Australian waters, the Prime Minister ordered the ship be boarded by Australian SAS troops. This brought censure from the government of Norway which accused the Australian Government of failing to meet obligations to distressed mariners under international law. The Howard Government subsequently adopted legislation which excised Christmas Island from Australia's migration zone, meaning that asylum seekers arriving on Christmas Island could not automatically apply to the Australian government for refugee status. This allowed the Royal Australian Navy to relocate them to other countries (Papua New Guinea's Manus Island, and Nauru) as part of the so-called Pacific Solution; see David Marr and Marian Wilkinson, *Dark Victory* (Sydney: Allen & Unwin, 2003) 112-19.

[523] In the early afternoon of 6 October 2001, a southbound wooden hulled "Suspected Illegal Entry Vessel" designated SIEV 4, carrying 223 asylum seekers and believed to be operated by people smugglers, sank and was intercepted by HMAS Adelaide 100 nautical miles north of Christmas Island. The next day, which was the day before the issue of writs for the 2001 federal election, Immigration Minister Philip Ruddock announced that passengers of SIEV 4 had thrown children overboard. This claim was later repeated by other senior government ministers including Defence Minister Peter Reith and Prime Minister John Howard. However, a Senate select committee inquiry, composed mainly of non-government senators, found that no children were thrown overboard from SIEV 4, that the evidence did not support the Children Overboard claim, and that the photographs purported to show children thrown into the sea were taken after SIEV 4 sank. In response, Howard said that he acted on the intelligence he was given at the time. See Parliament of Australia, Senate, *Select Committee for an Inquiry into a Certain Maritime Incident*, 23 October 2002; <http://www.aph.gov.au/Senate/committee/maritime_incident_ctte/report/c03.htm>.

Island[524] and the Government's refusal to let them step foot on Australian territory and apply for asylum. The handling of both incidents drew strong criticism internationally. Domestically, however, Canberra's hard line attracted strong support with the Government's popularity rating rising throughout both crises. Television news polls showed up to 90 per cent support for the Government's actions as many Australians viewed the asylum seekers as "queue-jumpers" and agreed with John Howard and his assertion that "we will decide who comes to this country and under what circumstances".[525]

The 9/11 attacks on the World Trade Centre and the Pentagon in the United States also had major implications for the Howard government's election campaign. The Australian support of the US-led military operation in Afghanistan dominated the news throughout the campaign. The Prime Minister had personally witnessed the attacks in Washington D.C. – an experience which heavily influenced his perception of the threat of terrorism and approach to counter it. In Australia, too, the attacks inspired fear in the minds of many citizens. During the election campaign, the Coalition did not shy away from seeking to capitalise on public fears. Howard and other government ministers repeatedly linked the issue terrorism to the refugee regulatory developments in Australia and around the world. Two months after 9/11 and a mere four days before the federal election of 11 November 2001, the Prime Minister even went so far to suggest that "Australia had no way to be certain terrorists or people with terrorist links were not among asylum seekers trying to enter the country by boat from Indonesia."[526] While claims linking boat-people with terrorists were subsequently discounted by commentators including ASIO's Director-General,[527] they achieved their political purpose at the time. The Coalition successfully reversed the trend in the opinion polls and Howard was re-elected for a historic third term in office with an increased majority.[528]

Although the threat of terrorism had been instrumentalised for political gain during the election campaign, the Government did not introduce into Parliament new anti-terrorism legislation until March 2002. As part of that new legislation, the Government added a raft of new terrorism offences to the *Criminal Code Act 1995* (Cth) introducing a definition of "terrorist act" and criminal

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[524] Christmas Island is a territory of Australia in the Indian Ocean located 2,600 kilometres northwest of the Western Australian city of Perth.

[525] ABC, TV Program Transcript, Lateline, "Liberals accused of trying to rewrite history," 21 November 2001; <http://www.abc.net.au/lateline/content/2001/s422692.htm>.

[526] Dennis Atkins, "PM links terror to asylum seekers," *Courier Mail* (Brisbane), 7 November 2001.

[527] ASIO's then Director-General, Dennis Richardson, for example, confirmed in a 2002 hearing of the Parliamentary Joint Committee on ASIO, ASIS and DSD that there had not been any occasion on which the new anti-terrorism legislation (provisions of the ASIO Act) could have been invoked to detain or question asylum seekers seeking residence in Australia. See Parliament of Australia, Joint Committee on ASIO, ASIS and DSD, Review of the ASIO Legislation Amendment (Terrorism) Bill 2002, Official Committee Hansard, 30 April 2002, 26.

[528] See generally David Solomon (ed.), *Howard's Race: Winning the Unwinnable Election* (Sydney: HarperCollins, 2002).

sanctions for involvement with a terrorist organisations. In addition, Australia's domestic intelligence agency, ASIO, was given unprecedented powers that enabled it to detain persons not suspected of any offence for up to seven days without charge or trial.

This chapter will examine the key legislative changes adopted by the Howard government in the period of early 2002 to mid-2003. First, the chapter will address the question whether, and to what extent, there was a need to adopt new legislation or whether existing legislation provided a sufficient framework to prosecute (and prevent) terrorism-related activities. It is argued that the Government failed to explain clearly why existing laws were inadequate and new legislation was warranted. The analysis will then turn to the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) and the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) which represented the core of the first package of anti-terrorism laws. It is argued that both pieces of legislation introduced measures unprecedented in Australian history, that many of the new provisions were drafted too broadly and lacked legal certainty, and that the laws continue to lack necessary safeguards. Furthermore, it remains unclear whether the new legislation actually improved security. The chapter thus also addresses the question of whether the new legislative measures have been effective. While measuring the effectiveness of laws is difficult for a variety of reasons, it is argued that the number of prosecutions brought under the new laws, as well as the number of warrants sought by ASIO, do not provide compelling evidence (in retrospect) for an assertion that these unprecedented laws were needed.

II. The Need for Anti-Terrorism Legislation

In order to appreciate the significance of Australia's domestic response to the threat of international terrorism and the perceived need for new, specialised legislation, it is helpful to briefly consider the historical context. Unlike many other Western liberal democracies, Australia has never experienced a sustained domestic campaign of terrorist or political violence. It has neither witnessed the form of left-wing political violence or terrorism pursued by the Red Army Faction in Germany or the Red Brigades in Italy; nor has there been any separatist political violence or terrorism such as in Northern Ireland (IRA) and Spain (ETA). Instances of violent political unrest in Australia have been rare and limited to a number of attacks attributed to Croatian Separatists, the Ananda Marga and a small group of individuals who launched attacks against the Family Court.[529] Most prominent among the cases was the garbage bin bomb explosion outside the Hilton Hotel in Sydney on 13

[529] See Jenny Hocking, *Beyond Terrorism: The Development of the Australian Security State* (Sydney: Allen & Unwin, 1993) 123-40.

February 1978. The explosion killed two garbage collectors and a police officer and injured eleven others. At the time of the explosion, the Hilton Hotel was hosting the first Commonwealth Heads of Government Regional Meeting. While the bombing has been attributed to the Ananda Marga and described as a "terrorist act", there is no consensus over the identity of the perpetrators or the exact reasons for the attack. Indeed, 30 years on, the case remains to be solved and continues to be subject to a number of conspiracy theories.[530]

At the time, however, the incident triggered a debate on the adequacies of Australia's counter-terrorism capabilities. The federal government of Prime Minster Malcolm Fraser appointed Justice Robert Hope to review coordination arrangements between law enforcement, intelligence and other civilian authorities at the Commonwealth, State and Territory level as well as the need for specific legislation. Tabling the Protective Security Review Report in May 1979, Hope concluded that domestic intelligence gathering and law enforcement bodies were given adequate powers under existing legislation. [531] He also found that no special anti-terrorism laws were required as "virtually all terrorist acts involve what might be called ordinary crimes – murder, kidnapping, assault, malicious damage and so on – albeit for political motives."[532] In this assessment, Justice Hope followed the position expressed during the inquiry by former High Court Justice Victor Windeyer who submitted that "the best safeguard against new terrors and apprehensions may lie in the rigorous enforcement of existing criminal law rather than making new laws expressly about 'terrorism'."[533]

A similar conclusion was reached by a number of subsequent governmental reviews of Australia's counter-terrorism capabilities in the 1980s and 1990s including the Holdrich Inquiry (1986)[534], the Gibbs Committee (1987-91)[535], the Codd Review (1992)[536], and the Honan and Thompson Review (1993)[537]. None of these reviews advocated the introduction of specific anti-terrorism legislations. As a consequence, Australia did not have any specific anti-terrorism legislation in place before 9/11.

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[530] "Sydney Hilton Hotel blast commemorated," *Sydney Morning Herald* (Sydney), 13 February 2008.
[531] Protective Security Review, *Report (Unclassified Version)*, (Canberra: AGPS, 1979).
[532] Protective Security Review, xv.
[533] Victor Windeyer, in ibid, 290.
[534] The resulting report, *Counter Terrorism Capabilities in Australia*, was not made public. However, subsequent reports indicate that the review 'emphasised that the single most important preventive measure against terrorism is the capability to produce timely and accurate intelligence'. It reported 'general satisfaction with co-operation between [intelligence and law enforcement] agencies in Australia' but 'pointed to the need for some improvement in the information flow to Commonwealth Ministers during a terrorist incident'. The Hon. Mick Young, "Counter Terrorism in Australia," Ministerial Statement, House of Representatives, *Debates*, 17 October 1986, 2295.
[535] Attorney-General's Department, Review of Commonwealth Criminal Law, *Final Report* (Canberra: AGPS, 1991).
[536] Michael Codd AC, *Review of Plans and Arrangements in Relation to Counter-Terrorism*, tabled 24 March 1994, Parliamentary Paper No. 151/1994.
[537] Frank Honan and Alan Thompson, *Report of the 1993 SAC-PAV Review* (Canberra: AGPS, 1994).

The absence of special anti-terrorism laws did not mean, however, that Australia's legal system was insufficiently equipped to deal with criminal acts of political violence and terrorism. On the contrary, there already existed a wide range of offences covering conduct generally associated with terrorism prior to the introduction of the new anti-terrorism legislation in 2002. These included traditional criminal offences like murder, kidnapping and conduct likely to involve serious risk to life or personal injury and damage to property.[538] Existing laws also made it an offence to engage in treason, treachery, sabotage, sedition, espionage, or disclose official secrets, or possess weapons of mass destruction.[539] In addition, it was already a criminal offence to engage in "politically motivated violence"[540], which included acts or threats of violence or harm for the purpose of influencing domestic or foreign governments or overthrowing or destroying a domestic government or constitutional system. Moreover, it was a criminal offence to be a member of, or provide funds to, a prohibited association;[541] and recruit people, or to train and organise in Australia, for armed incursions or operations on foreign soil.[542]

Apart from these substantive offences, criminal liability also extended to cover so-called secondary liability offences. These offences criminalised attempting or procuring a criminal offence, or aiding, abetting or counselling another person to commit an offence as well as conspiring with another person to commit an offence.[543] In addition, the secondary liability offences allowed law enforcement agencies to take action proactively to prevent offences from occurring. Accompanying these criminal offences, law enforcement and intelligence agencies already had powers to collect intelligence inside and outside Australia regarding security threats and take action to address those threats. Some of these agencies had the power to engage in telecommunications interception,[544] use listening and tracking devices, gain access to computers[545] and engage in undercover operations.[546] Moreover, a National Crime Authority also existed with power to investigate and combat serious

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[538] For example, see Part 3 of the *Crimes Act 1900* (NSW) which contains offences against the person, including murder, acts causing danger to life or bodily harm and kidnapping and Part 4 of the *Crimes Act 1900* (NSW), which contains offences against property. Similar offence provisions exist in all other State and Territories in Australia.

[539] See for example *Crimes Act 1914* (Cth) (which contained offences including treason, treachery, sabotage, sedition, unlawful drilling, espionage, official secrets, being in a prohibited place, harbouring spies, taking unlawful soundings, computer related acts, postal and telecommunications offences); *Air Navigation Act 1921* (Cth); *Public Order (Protection of Persons and Property) Act 1971* (Cth); *Crimes (Biological Weapons) Act 1976* (Cth); *Nuclear Non-Proliferation (Safeguards) Act 1984* (Cth); *Crimes (Hostages)Act 1989* (Cth); *Crimes (Aviation) Act 1991* (Cth); *Crimes (Ships and Fixed Platforms Act) Act 1992* (Cth); *Chemical Weapons (Prohibition) Act 1994* (Cth); *Weapons of Mass Destruction (Prevention of Proliferation) Act 1994* (Cth).

[540] *Australian Security Intelligence Organisation Act 1979* (Cth) ss4, 8A.

[541] *Crimes Act 1914* (Cth) Part 11A concerning unlawful associations.

[542] *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth).

[543] *Criminal Code Act 1995* (Cth), Division 11.

[544] *Telecommunications (Interception) Act 1979* (Cth).

[545] *Australian Security and Intelligence Organisation Act 1979* (Cth).

[546] *Crimes Act 1914* (Cth).

organised crime on a national basis and to analyse and disseminate relevant criminal information and intelligence to law enforcement agencies.[547]

Interestingly, the Australian government expressly referred to this range of existing criminal offences as well as to the investigatory and enforcement powers of Australian intelligence and law enforcement agencies in its December 2001 report to the UN Counter-Terrorism Committee on the implementation of Security Council resolution 1373 (2001).[548] The Government stated that Australia had "a highly coordinated domestic counter-terrorism response strategy incorporating law enforcement, security and defence agencies... [and] already had in place extensive measures to prevent in Australia the financing of, preparation and basing from Australia of terrorist attacks on other countries."[549] It was also reported that Australia had an "extensive network of law enforcement liaison officers and bilateral treaties on extradition and mutual legal assistance to facilitate cooperation with other countries in the prevention, investigation and prosecution of terrorist acts."[550] Furthermore, the report explicitly stated that "existing Commonwealth and State and Territory legislation covers offences of murder, conspiracy, aiding and abetting, kidnapping, conduct likely to involve serious risk of life, personal injury, damage to property, all involving heavy penalties, as well as dealing with proscribed organisations, intelligence, investigation and enforcement."[551]

While the Government invoked the wide range of existing domestic legislative and administrative measures to demonstrate, at the international level, its compliance with UN Security Council resolutions as well as with obligations under international conventions on counter-terrorism, it painted a rather different picture to the audience at home. Three weeks after the 9/11 attacks the Government declared that Australia's legal system was ill-equipped to deal with the "new" security threats and required extensive amendment. On 2 October 2001, the then Attorney-General, Daryl Williams, announced that the Government would introduce new legislation to permit, under warrant, the formal questioning by ASIO of people "who may have information that may be relevant to ASIO's investigations into politically motivated violence" and the arrest by State or Federal police of people "in order to protect the public from politically motivated violence."[552] The Attorney-General also indicated that the Government would introduce new general offences based

[547] *National Crime Authority Act 1984* (Cth).
[548] In Resolution 1373 (2001) the UN Security Council called for States to prevent and suppress the financing of terrorist acts and to "criminalize the wilful provision or collection ... of [terrorist] funds by their nationals or in their territories." It also required States to ensure that "terrorist acts are established as serious criminal offences in domestic laws ... and that the punishment duly reflects the seriousness of such terrorist acts." Australian Government, *Report to the UN Counter-Terrorism Committee* (21 December 2001) 3; <http://www.un.org/sc/ctc/countryreports/Creports.shtml>.
[549] Ibid. 3
[550] Ibid.
[551] Ibid. 14
[552] The Hon. Daryl Williams, MP, "New Counter-Terrorism Measures," *Media Release*, 2 October 2001.

on the *Terrorism Act 2000* (UK) covering "violent attacks and threats of violent attacks intended to advance a political, religious or ideological cause which are directed against or endanger Commonwealth interests."[553]

It took the federal government another five months to introduce the actual laws into Parliament. Moreover, in-between the announcement of its intention to amend the laws and the actual introduction of the amendments, the Government did not, at any stage, explain clearly why the existing legislative framework was insufficient to deal with criminal offences associated with terrorism. It also remains unclear whether the Government undertook any thorough review of existing legislation and sufficiently explored the need for amendments. What is clear, however, is that the three-week period between the 9/11 attacks and the 2 October announcement of new legislation provided an extraordinarily short timeframe for the Government to conduct a systematic and careful analysis and to reach a rational and well-founded conclusion that new laws were needed.

There was, of course, also the question whether Australia needed to introduce new anti-terrorism legislation as part of its international obligations. The Minister for Justice and Customs, Chris Ellison, for instance, hinted at this imperative by declaring that "the government has a clear responsibility to cooperate with global counterterrorism measures (...)".[554] Global counter-terrorism efforts in the aftermath of 9/11 were mainly mandated by UN Security Council resolution 1373 (2001). This resolution required UN Member States, *inter alia*, to take "the necessary steps to prevent the commission of terrorist acts," to "prevent and suppress the financing of terrorist acts," to "prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens," and to "ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice." However, as the Law Council of Australia noted in its March 2002 submission to the Senate Legal and Constitutional Legislation Committee's inquiry into the first package of anti-terrorism legislation, it was "by no means clear that Australia's international obligations require[d] the creation of separate terrorism offences."[555] All that Security Council resolution 1373 required, said the Law Council, was that Australia made sure that "terrorist acts [were] established as serious criminal offences in domestic laws' and that the punishment duly

[553] Ibid. In addition, on 28 October 2001, Prime Minister John Howard recommended a summit of State and Territory leaders "to develop a new framework under which transnational crime and terrorism can be dealt with by law enforcement at a Commonwealth level." One objective of the summit would be "[a] reference of constitutional power to the Commonwealth to support an effective national response to the threats of transnational crime and terrorism." The Hon. John Howard, MP, "A Safer, More Secure Australia," *Media Release*, 30 October 2001.
[554] Commonwealth of Australia, *Parliamentary Debates, Senate*, 24 June 2002, 2444 (Chris Ellison).
[555] Law Council of Australia, *Submission to the Senate Legal and Constitutional Legislation Committee*, (March 2002) 32.

reflect[ed] the seriousness of such terrorist acts."[556] However, as confirmed by the Government in its first report to the UN Counter-terrorism Committee (discussed above), existing Commonwealth and State and Territory legislation already covered offences generally associated with terrorism including murder, kidnapping, assault, and malicious damage.

The first more detailed explanation of why special anti-terrorism legislation was needed was given by Attorney-General Daryl Williams in his second reading speeches on the first anti-terrorism legislation package (12 March 2002) and the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (Cth) (21 March 2002). Introducing the *Security Legislation Amendment (Terrorism) Bill 2002* (Cth), Williams stated that:

> Since 11 September there has been a profound shift in the international security environment. This has meant that Australia's profile as a terrorist target has risen and our interests abroad face a higher level of terrorist threat. This package [of legislation], and other measures taken by the Government, are designed to bolster our armoury in the war against terrorism and deliver on our commitment to enhance our ability to meet the challenges of the new terrorist environment. (...) The Howard government emphatically rejects any suggestion that because we have not experienced any direct terrorist threat in Australia since September 11 this package of legislation is not justified or is an overreaction. We are actively involved in the war against terrorism. We cannot assume that we are not at risk of a terrorist attack. We cannot afford to become complacent. And we should never forget the devastation of September 11. (...) For these reasons this government has reaffirmed its commitment to combating terrorism in all its forms. (...) Other like-minded countries have passed, or are in the process of passing, antiterrorism legislation designed to assist in this fight. Consequently, counter-terrorism legislation and proposals throughout the world have been considered in the preparation of this bill.[557]

In essence, Williams provided a three-pronged rationale for the need to introduce special anti-terrorism legislation. First, he asserted that there was a new terrorist environment with a heightened threat to Australia. Second, legislation was needed to "bolster our armoury" in the war against terrorism. Third, other countries, too, were enacting new anti-terrorism legislation, a development which influenced the Australian (proposed) amendments. While the Attorney-General was providing some justification for the Government's decision to enact new specialised legislation, the explanations given were nonetheless considerably vague and rather ill-conceived. With regard to the first assertion, Williams did not provide any explanation as to why Australia's profile as a terrorist target had risen. Similarly, he did not explain why, or how, the "profound shift in the international security environment" affected Australia. It appears that the Government worked on

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[556] Ibid.

[557] Commonwealth of Australia, *Parliamentary Debates, House of Representatives*, 12 March 2002, 1043 (Daryl Williams).

the rather general assumption that the 9/11 attacks on the United States had also increased the threat to Australia.

Furthermore, the "bolster our armoury" argument was problematic for proportionality reasons. In presenting the Government's decision to introduce new legislation Williams did not provide any clarification in relation to the specific aims and objectives of specialised anti-terrorism laws, or indeed why the Government considered existing legislation to be insufficient. The "bolster our armoury" metaphor rather allowed for an interpretation – especially in the light of Canberra's report to the UN Counter-terrorism Committee – that the proposed legislation was not absolutely necessary but designed to be available to the Government in the event of a future materialisation of the terrorism threat. Indeed, the Attorney-General stated that the new laws were drafted to "meet the challenges of the new terrorist environment." Even if one accepts that this may constitute a legitimate aim of legislation in general, it would have been necessary for the Government to clearly explain these challenges to Parliament and to demonstrate in detail how the proposed legislative amendments addressed them. The "just-in-case" approach to legislative reform, however, was incompatible with the imperatives of proportionality.

Finally, it was inappropriate to refer to legislative developments in other countries as a justification for the introduction of special laws in Australia. This argument was based on an erroneous assumption that the threat of terrorism was universal, or equal in scope to the threat experienced by other countries, and, as consequence, that foreign legislative responses to the threat were of use for the development of Australian laws. The threat level in Australia, however, was hardly comparable to that in other "like-minded" countries such as the United States and the United Kingdom. In addition, this assertion failed to recognise that anti-terrorism laws in other countries were developed (and operated) in an entirely different legal and political framework. In countries like Germany or France, for instance, anti-terrorism laws were developed against the background of a constitutionally entrenched human rights catalogue. Similarly, in the United Kingdom and New Zealand, human rights acts enacted by Parliament provided safeguards against excessive anti-terrorism legislation. Australia, on the other hand, has neither constitutional human rights protection nor a federal human rights act. This lack of human rights protection in Australia was also noted by the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin. In his country report on Australia he stated that "it is of concern to the Special Rapporteur (...) that Australia does not have domestic human rights legislation capable of guarding against undue limits being placed upon the rights and

freedoms of individuals."[558] It was thus misguided for the Attorney General to suggest that legislative provisions and initiatives (or parts thereof) in other jurisdictions were "importable" into Australia.

III. The Introduction of Unprecedented Laws

1. The Security Legislation Amendment (Terrorism) Act 2002 (Cth)

The Government introduced a first package of anti-terrorism legislation into the House of Representatives on 12 March 2002. This package comprised of five bills including the *Security Legislation Amendment (Terrorism) Bill 2002* (Cth), the *Suppression of the Financing of Terrorism Bill 2002* (Cth), the *Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002* (Cth), the *Border Security Legislation Amendment Bill 2002* (Cth), and the *Telecommunications Interception Legislation Amendment Bill 2002* (Cth).[559] The package consisted of no less than 120 pages and, as the Senate Legal and Constitutional Committee observed, ranked "as some of the most important to come before the Parliament in the last twenty years" raising "significant and sometimes complex and technical issues."[560] Despite the proposed legislation's importance and complexities, however, the Government stifled parliamentary debate and the five bills were passed on 13 March 2002. As, Duncan Kerr, a former Attorney-General of the Labor government of Prime Minister Paul Keating (1991-96), pointed out:

> Apart from the Attorney-General's second reading speeches, no government members made substantive contributions even in that curtailed opportunity for debate. Many members of the House, on both sides, wanting to express considered reservations were excluded from expressing their concerns.[561]

A day later, on 14 March 2002, the bills were introduced into the Senate and the second reading debate was adjourned. The bills, however, did not pass the Senate and the Selection of Bills Committee Report No 2 of 2002 –which was adopted by the Senate on 20 March 2002 – recommended that they be referred to the Legal and Constitutional Committee for inquiry and report by 3 May 2002. The purpose of the enquiry was "to allow all non-government stakeholders to undertake a comprehensive scrutiny of the numerous and detailed matters in this 120 page

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[558] UN Special Rapporteur on the promotion and protection of human rights while countering terrorism, *Australia: Study on human rights compliance while countering terrorism*; Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (Mr. Martin Scheinin) UN Doc A/HRC/4/26/Add.3 (14 December 2006) 5; [hereinafter "Scheinin Report"].

[559] The Act and other key pieces of Australia's national security legislation are available at <http://www.nationalsecurity.gov.au>.

[560] Senate Legal and Constitutional Committee report, p.

[561] Duncan Kerr, *Submission to Senate Legal and Constitutional Committee*, March 2002 (Submission 431) 3.

package including significant issues like the creation of new offences, imposition of life sentence penalties, capacity to proscribe organisations, expansion of executive power, increase in policing powers for customs service and telecommunications powers."[562]

The Senate Legal and Constitutional Committee, chaired by the Liberal Party Senator Marise Payne, advertised on 23 March 2002 for submissions from interested individuals and organisations to be received by 5 April 2002. Despite the extraordinarily short timeframe for the inquiry, the Committee received no less than 431 submissions, many of which expressed serious concerns about the inadequate time for proper consideration of the bills. The matter was of such importance to the Law Council of Australia, for instance, that it explicitly requested the Committee to record the Council's "strong protest at the totally inadequate consultation period."[563] In relation to substantive matters, a large number of submissions questioned the need for new legislation and the proposed powers of the Attorney-General to proscribe specific groups as terrorist organisation and criminalise membership.[564] Many submissions also pointed to the Attorney-General's statements that there is no known specific threat of terrorism in Australia and that Australia had "well practiced and coordinated national security arrangements."[565] In addition, questions were raised regarding the bills' constitutional legitimacy and their implications for civil liberties, especially those of minority groups.[566]

The Committee held hearings in Sydney, in Melbourne, and in Canberra in April 2002. In contrast to the Attorney General's parliamentary speeches, government agencies and departments this time provided more information on why the legislative amendments were considered to be necessary. The Director-General of Security, Dennis Richardson, for instance, argued that existing criminal laws did not provide an effective legislative framework for the prevention of terrorism. According to Richardson the legislation was "necessary to deter, to punish and to seek to prevent. It is the latter, that is, prevention, which is a central element in the legislation."[567]

The Attorney-General's Department also refereed to prevention aspect and argued that the existing legislative framework was inadequate in this regard.[568] It noted that specific laws were needed to

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[562] Parliament of Australia, Senate Legal and Constitutional Legislation Committee (SLCLC), Report "Consideration of Legislation Referred to the Committee Security Legislation Amendment (Terrorism) Bill 2002 [No.2]; Suppression of the Financing of Terrorism Bill 2002; Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002; Border Security Legislation Amendment Bill 2002; Telecommunications Interception Legislation Amendment Bill 2002," May 2002, 1 [hereinafter "SLCLC Report, SLAT Bill, 2002"].
[563] Ibid, 2.
[564] Ibid, 45-7.
[565] Ibid, 22.
[566] Ibid, 47.
[567] Ibid, 23.
[568] Ibid. 24.

address legislative gaps, particularly in relation to providing or receiving training, directing an organisation that fosters preparation for a terrorist act and possessing "things connected with a terrorist act". It further noted that the existing laws concerning conspiracy, attempt, incitement and aiding and abetting were problematic, in that many ancillary offences could only be proven if they attached to a specific primary offence. The nature of terrorism, however, was such that many persons involved in terrorist activity may not know the specific details of the act or offence that will be committed.[569]

It appears that the Committee accepted that an extension of criminal liability for *prevention* purposes was a suitable approach to counter-terrorism.[570] Indeed, in the discourse on the need of criminal law reform there was generally little debate about whether the criminal justice system provided a proper framework for the *prevention* of terrorism (distinct from the post-facto prosecution and punishment of crimes committed by terrorists). Yet, it is precisely this matter which has led to considerable debate in other jurisdictions such as Germany or the United Kingdom.[571]

The Senate Committee tabled its report on 8 May 2002. While it considered that new legislation was "justified" to achieve "a comprehensive approach to dealing with terrorism", it noted "the concerns expressed by many organisations and individuals about whether the legislative package, particularly the Security Bill, is necessary."[572] The Committee also referred to the "serious reservations about the breadth of the proposed legislation in relation to constitutional issues, potential breaches of international law and possible adverse effects on particular groups within the Australian community."[573]

The Government presented its response on 4 June 2002 and a revised package of legislation was debated in the Senate over several days in late June 2002. At first, Labor opposition members objected to a number of the provisions citing concerns about the *Security Legislation Amendment (Terrorism) Bill 2002* (Cth) in particular. However, after the Government agreed to some minor

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[569] The Attorney-General's Department also argued that existing provisions relating to the proscription of unlawful associations under Part IIA of the *Crimes Act 1914* were primarily directed at politically-motivated organisations rather than those inspired by religious or ideological motivations. Furthermore, the penalties for those offences (maximum two years imprisonment) were found to be "clearly inadequate"; ibid, 25.

[570] Simon Bronitt has argued that the extension of criminal law for counter-terrorism purposes was not really a new phenomenon but rather followed a general trend that was previously observable in the context of the so-called war on drugs for instance; see Simon Bronitt, "Australia's Response to Terrorism: Neither Novel Nor Extraordinary?," Paper presented at the Castan Centre For Human Rights Law Conference "Human Rights 2003: The Year in Review", 4 December 2003; <http://www.law.monash.edu/castancentre/events/2003/bronitt-paper.pdf>.

[571] See, e.g., Marc Lendermann, "Prävention durch Recht - Kann normativ auf Terrorismus reagiert werden?" *Humboldt Forum Recht* 12 (2009): 163-75; <http://www.humboldt-forum-recht.de/deutsch/12-2009/beitrag.html#uupunkt4>. This is exactly why some jurisdictions such as Germany have refrained from introducing specific terrorism offences into criminal law.

[572] SLCLC Report, SLAT Bill, 2002, 28.

[573] Ibid, 28-9.

amendments, the Senate passed all five bills and the laws subsequently received Royal Assent on 5 July 2002. Nevertheless, major concerns remain, mostly in relation to *Security Legislation Amendment (Terrorism) Act's* definition of "terrorist act", the scope of ancillary offences, and the definition and executive proscription of "terrorist organisations". These concerns will now be discussed in more detail.

a) The Definition of "Terrorist Act"

The *Security Legislation Amendment (Terrorism) Act 2002* (Cth) introduced a definition of "terrorist act" and provides for criminal sanctions for involvement with a terrorist organisation, including for providing support or funding, recruiting members, directing its activities or being a member. According to section 100.1 as introduced into the Criminal Code a "terrorist act" is defined as:[574]

> (a) ... an action [that] falls within subsection (2) and does not fall within subsection (3); and
> (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
> (c) the action is done or the threat is made with the intention of
>
> (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
> (ii) intimidating the public or a section of the public

An action falls within subsection 2 and is classified as a terrorist act (unless it falls within subsection 3) if it:

> (a) causes serious harm that is physical harm to a person; or
> (b) causes serious damage to property; or
> (c) causes a person's death; or
> (d) endangers a person's life, other than the life of the person taking the action; or
> (e) creates a serious risk to the health or safety of the public or a section of the

[574] Under s. 101.1, a person is liable for life imprisonment if he/she commits a terrorist act. Under s.101.1(2), the person is liable under Australian law even if the terrorist conduct and its results occur wholly overseas.

public; or

(f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:

(i) an information system; or
(ii) a telecommunications system; or
(iii) a financial system; or
(iv) a system used for the delivery of essential government services; or
(v) a system used for, or by, an essential public utility; or
(vi) a system used for, or by, a transport system.

An action falls within subsection 3, and is excluded from the definition of a terrorist act, if it

(a) is advocacy, protest, dissent or industrial action; and
(b) is not intended:

(i) to cause serious harm that is physical harm to a person; or
(ii) to cause a person's death; or
(iii) to endanger the life of a person, other than the person taking the action; or
(iv) to create a serious risk to the health and safety of the public or a section of the public.

As enacted, the definition of "terrorist act" is considerably broad and criminalises action that goes far beyond the kind of terrorist attacks that were supposed to be the targets of the legislative amendments. While section 100.1(3) explicitly excludes political protest and industrial action not intended to cause serious physical harm etc., the ultimate intent of the act, its political, ideological or religious motivation, is precisely what distinguishes terrorism from other forms of criminal violence already covered by existing legislation. Indeed, it is the same intent that lies at the heart of every political protest and industrial action. As Jenny Hocking has argued, this nexus between "terrorist act" as defined in section 100.1 and ordinary political dissent may ultimately criminalize politics.[575]

The breadth of the definition has been widely criticised both nationally and internationally. Justice John Dowd of the Australian chapter of the International Commission of Jurists, for example, stated "the creation of the offence of terrorism is at the heart of the whole of this legislation and is the

[575] Hocking, "Counter-Terrorism and the Criminalisation of Politics," 368.

danger of the whole legislation."[576] Similarly, Justice Peter McClellan, a New South Wales Supreme Court Judge, considered the definition "problematic" as it was "apparent that the definition is capable of catching conduct that does not fall within popular notions of a terrorist act."[577] These criticisms were echoed by professional organisations like the Law Council of Australia and Law Institute of Victoria who both expressed their concerns in several submissions to Parliament and Government bodies.[578] The Law Council of Australia, in particular, criticised the fact that the definition included threats of action, as well as completed acts. It argued that the legal circularity created by the inclusion of a threat of action was "likely to hinder prosecutions and increase the difficulties members of the public have in understanding the legislation."[579]

Internationally, the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin, took the view that the Australian definition of "terrorist act" overstepped the UN Security Council's characterisation of the term.[580] The Special Rapporteur, in his December 2006 Report on Australia's human rights compliance while countering terrorism, observed that the acts defined in subsections 100.1(2), such as acts causing damage to property or to electronic systems, include actions were not defined in the international conventions and protocols relating to terrorism.[581] Like the Law Council of Australia, Scheinin also expressed concern about the definition's inclusion of threats of action and called for "caution in this respect, in order to ensure compliance with the requirements of legality."[582]

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[576] Parliament of Australia, Joint Committee on ASIO, ASIS and DSD, Report "Completed Inquiry: An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002," 5 June 2002, 7.
[577] Peter McClellan, *Terrorism and the Law*, 9;
<http://www.judcom.nsw.gov.au/publications/selected_papers/terror.pdf/view>.
[578] See, e.g., Law Council of Australia, "Submission to the Senate Legal and Constitutional Legislation Committee, *Security Legislation Amendment (Terrorism) Bill 2002 [No.2] and Related Bills*," April 2002; Law Council of Australia, "Submission to the Senate Legal and Constitutional Committee, *Anti-Terrorism Bill 2004*," April 2004; Law Council of Australia, "Submission to the Senate Legal and Constitutional Committee, *Anti-Terrorism Bill (No. 2) 2004*," July 2004. See also the work of the Law Institute of Victoria on this issue, for example, Law Institute of Victoria, "Submission, *UN Special Rapporteur Report on Australia's human rights compliance while countering terrorism*," May 2007; Law Institute of Victoria, "Submission, *Parliamentary Joint Committee on Intelligence and Security's Security Legislation Review*," July 2006; Law Institute of Victoria, "Submission, *Security Legislation Review Committee's Security Legislation Review*," January 2006.
[579] Law Council of Australia, *A Consolidation of the Law Council of Australia's Advocacy in Relation to Australia's Anti-terrorism Measures*, Anti-Terrorism Reform Project, November 2008, 22; [hereinafter "Law Council Report 2008"].
[580] UN Security Council Resolution 1566 (2004) which provides a summary of the internationally accepted understanding of the term "terrorist act". It requires members States to "cooperate fully in the fight against terrorism and prevent and punish acts that are committed: with the intention of causing death or serious bodily injury or the taking of hostages; and for the purpose of provoking a state of terror in the general public or in a group of persons or particular persons, intimidating a population or compelling a government or an international organisation to do or to abstain for doing any act (irrespective of whether motivated by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature)."
[581] Scheinin Report, 8 at para 16.
[582] Ibid, 9.

b) Ancillary Offences

The link between "terrorist act" and ordinary political dissent is taken further in the Act's introduction of ancillary offences that can stand even if the terrorist act itself does not occur. Under traditional criminal law, in order to be guilty of attempting, aiding and abetting or conspiring in relation to murder or property damage, the accused must be aware of the specific murder or property damage. The new provisions stipulate, however, that those who assist or fund terrorist activity are liable even if they are not aware ("reckless") of the specific activity. The specific offences include:

- providing or receiving training (Imprisonment for 25 years);[583]
- possessing things connected with terrorist acts (Imprisonment for 15 years);[584]
- collecting or making documents likely to facilitate terrorist acts etc (Imprisonment for 15 years).[585]
- other acts done in preparation for, or planning, terrorist acts (Imprisonment for life).[586]

The severity of the penalties for these ancillary offences is particularly concerning as they remain far in excess of those which apply to comparable criminal acts committed without the critical element of political, ideological or religious motivation. This not only introduces a lack of uniformity in penalties for similar offences but also suggests a capacity on the part of the prosecution for discretion in terms of offences to be laid.[587]

c) The Definition and Proscription of a "Terrorist Organisation"

The definition of "terrorist organisation" and the Attorney-General's proscriptive powers are equally problematic. In fact, the 2002 Senate Legal and Constitutional Committee's inquiry into the Security Legislation Amendment (Terrorism) Bill found that the definition and proscription of a "terrorist organisation" was "clearly one of the most significant issues of concern during this inquiry and aroused the most vehement opposition."[588] The Committee believed that "the proposed provisions are not acceptable to a large proportion of the Australian community and contain

[583] s 101.2.
[584] s 101.4.
[585] s 101.5.
[586] s 101.6.
[587] See also Hocking, "Counter-Terrorism and the Criminalisation of Politics," 368.
[588] SLCLC Report, SLAT Bill, 2002, 58.

significant omissions."[589] It therefore "urged" the Attorney-General to "reconsider the proposed proscription powers."[590] Despite the concerns and recommendations by the bi-partisan Committee the Government proceeded with the proposed amendments and Labor supported the legislation in the Senate. The Act defines "terrorist organisation" in section 102.1(1) and stipulates that:

> (a) an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs); or
>
> (b) an organisation that is specified by the regulations to be a terrorist organisation. A person is criminally liable if he/she directs, recruits for, trains or receives training from, funds or receives funds from, or provides support or resources for a terrorist organisation as defined in section 102.1(1).

Section 101.1 thus provides for two ways for an organisation to be identified as a "terrorist organisation". Either an organisation is found to be such an organisation by a court as part of the prosecution for a terrorist offence, or it is so specified by regulation. According to section 102.1(2), before a regulation specifying an organisation for the purposes of paragraph (b) of the definition above can be made, the Attorney General must be satisfied on reasonable grounds that the organisation to be listed:

> (a) is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur); or
>
> (b) advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).

An organisation "advocates" the doing of a terrorist act if:

> (a) the organisation directly or indirectly counsels or urges the doing of a terrorist act; or
>
> (b) the organisation directly or indirectly provides instructions on the doing of a terrorist act; or

[589] Ibid.
[590] Ibid.

(c) the organisation directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment (within the meaning of s 7.3) that the person might suffer) to engage in a terrorist act.

The definition and proscription of "terrorist organisations" is problematic for a number of reasons. First, it is concerning that it is sufficient for the Attorney-General to be satisfied that the listing decision is made upon "reasonable grounds". This means that an organisation can be listed based upon an ordinary, rather than the stricter criminal standard of proof ("beyond reasonable doubt"), with severe criminal penalties flowing from such a listing. The implications of this arrangement were exacerbated by the adoption of the *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth). For an organization to be specified by regulation, it originally had to be listed by the UN Security Council. The 2004 amendments, however, removed the requirement for a Security Council decision before an organisation can be listed as a terrorist organization for the purpose of domestic law. This means that the Attorney-General has the power to list organisations as "terrorist" based on Australia's national interest and security needs and the advice of Australian intelligence agencies. As a result, organisations like Nelson Mandela's ANC, the Free Papua Movement or any other group considered "terrorist" or not conducive to the public good for reasons of "national security" may be banned.

Second, the listing criterion that stipulates that an organisation may be proscribed if it advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur) lacks sufficient precision. While it is a legitimate objective to suppress the incitement of international terrorism, the lack of precision has the potential to cover statements which, in a very generalised or abstract way, somehow support, justify or condone terrorism. The legislation does not provide for clear listing criteria which is a fact that contributes to a lack in transparency of the proscription process.[591] This lack of transparency as well as the imprecise and broad formulation in section 102.1 (1A) (c) has also attracted criticism from the UN Special Rapporteur on the Promotion and Protection of Human

[591] The Parliamentary Joint Committee on ASIO, ASIS and DSD (PJCAAD, and later PJCIS) has repeatedly called for ASIO and the Attorney-General's department to provide a statement of the criteria it applies to the listing process. During its 2005 review of the listing of six terrorist organizations, the Committee received from the Director-General of ASIO a summary of ASIO's evaluation process in selecting entities for proscription under the Criminal Code. Factors included: engagement in terrorism; ideology and links to other terrorist groups/networks; links to Australia; threat to Australian interests; proscription by the UN or like-minded countries; and engagement in peace/mediation processes. The Committee recommended that ASIO and the Attorney General specifically address each of the six criteria referred above in all future statements of reasons particularly for new listings. However, when reviewing the listing of the Kurdistan Workers' Party (PKK) the Committee was subsequently informed that "the criteria are a guide only and that they are applied flexibly, and that not all elements of the criteria are necessary before a decision might be taken to list an organisation." See PJCAAD "Review of the listing of six terrorist organisations", 5 September 2005, [3.2]; and PJCIS, "Review of the listing of the Kurdistan Workers' Party (PKK)," 26 April 2006, [2.3].

Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin, who called on the Australian government to make sure there were effective judicial guarantees to accompany any measures related to the designation of entities as "terrorist organizations".[592]

Third, the proscription arrangement is problematic as the decision by the Attorney-General to outlaw a specific organisation is not subject to regular judicial review. The legislation stipulates that the listing of an organisation ceases to have effect after two years if the Attorney-General ceases to be satisfied that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, whichever occurs first. Once listed, however, it is difficult for an organisation to challenge the ban in the courts. Review of proscription decisions is only available under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). This means that a listing decision may be reviewed only on questions of law, and not on its merits. What is more, this limited process of judicial review is only available *after* the listing of a terrorist organization by the Attorney-General has occurred. As a consequence, any person seeking to challenge such listing may already be facing prosecution under provisions of the *Criminal Code Act 1995* (Cth) relating to membership in or involvement with a terrorist organization. It is difficult to see how this form of post facto judicial review could be effective as a protection for the organization in question. It thus would have been preferable to incorporate a measure of judicial scrutiny *before* the Attorney-General's decision takes legal effect and potentially criminalises the conduct of citizens.[593]

d) Terrorist Organisation Offences

Division 102 of the Criminal Code contains a number of what are generally described as "terrorist organisation offences". These offences relate to the conduct of a person who is in some way connected or associated with a "terrorist organisation". Under Division 102 it is an offence to:

- direct the activities of a terrorist organisation;[594]
- be a member of a terrorist organisation;[595]
- recruit a person to join or participate in the activities of a terrorist organisation;[596]
- receive or provide training to a terrorist organisation;[597]

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[592] Scheinin Report, 12.
[593] See also letter by Bob Gotterson QC, President of the Law Council of Australia, to the Hon Philip Ruddock, MP, Attorney-General, 3 March 2004 [copy on file with author].
[594] s 102.2.
[595] s 102.3.
[596] s 102.4.
[597] s 102.5.

- receive funds from or make funds available to a terrorist organisation;[598]
- provide support or resources that would help a terrorist organisation engage in, plan, assist or foster the doing of a terrorist act;[599]
- on two or more occasions associate with a member of a terrorist organisation or a person who promotes or directs the activities of a terrorist organisation in circumstances where that association will provide support to the organisation and is intended to help the organisation expand or continue to exist.[600]

The purpose of outlawing terrorist organisations is to impose criminal liability on the members of those organisations, and the individuals who support, fund or associate with those organisations. However, by criminalising mere membership in an organisation the focus of criminal liability is shifted from a person's conduct to their associations. As the Law Council of Australia observed, this unduly places a burden on freedom of association and has a disproportionately harsh effect on certain sections of the community who, simply because of their familial, religious or community connections, may be exposed to the risk of criminal sanction.[601] These problems are exacerbated by the manner in which terrorist organisations are proscribed as described above.

e) Parliamentary Review

In 2002, the first package of bills was passed subject to an agreement that a review of the operation, effectiveness and implications of the new laws would be conducted after three years. Provision was made in particular for an independent committee of review – the Security Legislation Review Committee (SLRC) to be initiated by the Attorney General and to report to the Attorney General and the Parliamentary Joint Committee on Intelligence and Security (PJCIS). In addition, the PCJIS itself was required to conduct a separate review on behalf of the Parliament.

The SLRC, chaired by Simon Sheller, QC, and comprising of a diverse group of experts,[602] commenced its review in late October 2005 and tabled its report in June 2006.[603] The report consisted of no less than 262 pages and made 20 substantive recommendations addressing a range

[598] s 102.6.
[599] s 102.7.
[600] s 102.8.
[601] See also Law Council Report 2008, 48-51.
[602] Simon Sheller, AO, QC, Gillian Braddock, SC, (Law Council of Australia representative), Ian Carnell (Inspector-General of Intelligence and Security), Karen Curtis (Privacy Commissioner), John Davies, APM, OAM, (Attorney-General's nominee), Graeme Innes, AM (Human Rights Commissioner), Professor John McMillan (Commonwealth Ombudsman), and Daniel O'Gorman (Law Council of Australia representative).
[603] Report of the Security Legislation Review Committee, AGPS Canberra June 2006 [hereinafter "Sheller Report"].

of problematic aspects of the legislation. It recommended, *inter alia*, revising the process for proscribing an organisation as a terrorist organization and proposed that section 102.8 of the *Criminal Code Act 1995* (Cth) (providing criminal liability for associating with terrorist organisations) be repealed altogether.[604] It also called on the Government to establish a legislative-based timetable for continuing review of the security legislation by an independent body. According to the Committee, this body could take the form of either an independent reviewer or an independent committee, such as the SLRC, and would conduct a further review of the legislation within three years.[605]

Six, months later, on 4 December 2006, the PJCIS, chaired by the Liberal Party MP David Jull, tabled its report which, in many respects, endorsed and reinforced the recommendations made by the Sheller Committee.[606] The PJCIS concluded that a special terrorism legal regime was "justifiable and forms an important, although not exclusive, tool in Australia's counter-terrorism strategy."[607] The PJCIS report contained 26 substantive recommendations covering all aspects of the operation of the laws enacted as part of the first package of anti-terrorism legislation. Like the Sheller Committee, the PJCIS recommended the appointment of an independent reviewer who would report to Parliament annually and would provide comprehensive and ongoing oversight. This independent reviewer would "provide valuable reporting to the Parliament and help to maintain public confidence in Australia's specialist terrorism laws."[608]

Both the Sheller Committee and the PJCIS noted the controversial nature of the legislation and called for significant amendments. Yet, the Howard government ignored those recommendations entirely. It was able to do so because the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) as well as the other acts of the first package of anti-terrorism legislation did not contain any sunset clauses. This meant that unlike the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) – which will be subject to closer analysis below – the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) did not have to by re-considered by Parliament in order to remain in operation.

While the Howard government did not take note of any of the recommendations made by the Sheller Committee and the PJCIS, it also took the Rudd government more than year to respond. On

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[604] Ibid, 4, 133.
[605] Ibid, 6, 8, 201-07.
[606] Parliament of Australia, Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation*, Report, December 2006 [hereinafter "PJCIS Report"]. The Committee recommended that "the offence of 'associating with a terrorist organisation' be re-examined taking into account the recommendations of the Sheller Committee," 81.
[607] Ibid, vii.
[608] Ibid, xv, 16-22.

23 December 2008, over a year after taking office, Attorney-General Robert McClelland issued a reply to the committee reports announcing, *inter alia*, that the Rudd government "will establish a National Security Legislation Monitor to review the practical operation of counter-terrorism legislation on an annual basis."[609] The Monitor will be an independent statutory office within the Prime Minister's portfolio and will report to Parliament. To implement bipartisan recommendations of the PJCIS, the Government further announced that it will refer two particular aspects of the counter-terrorism legislation to the Monitor once the office is established. These will be the offence of associating with a terrorist organisation, and strict liability aspects of other terrorism offences. The *National Security Legislation Monitor Bill* 2009 (Cth) was subsequently introduced into Parliament in June 2009.

f) Proportionality

As explained in Chapter 1 of this thesis, the principle of proportionality requires that legislative amendments are carefully designed to meet the objectives in question and that that they are not arbitrary. This means that there must be a reasonable relationship between the means employed and the aims sought. While the introduction of laws to combat terrorism and prosecute related crimes may, in principle, be a legitimate objective, it is difficult to see how many of the key legislative amendments introduced by the *Security Legislation Amendment (Terrorism) Act* 2002 (Cth) fulfil the requirements of proportionality. The Government failed to demonstrate the need for wide-ranging legislative reform and how the amendments would meet the (assumed) objective of reducing the terrorist threat and enhancing security. A wide range of stakeholders queried from the outset whether special terrorism offences were necessary to meet the objectives espoused by the Government, namely to protect the community from organised terrorist activities. The Law Council of Australia, for instance, continues to assert that terrorist activities are already criminalised by existing offences under traditional criminal law.[610]

Even if one accepts that new terrorism legislation was required to meet the challenges of an allegedly "new" security environment, the process of introducing the laws as well as the legislative provisions themselves still raise concern in relation to their proportionality. First, the Government

[609] Australian Government, Comprehensive Response to National Security Legislation Reviews, 23 December 2008; <http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/MediaReleases_2008_FourthQuarter_23December2008-ComprehensiveResponseToNationalSecurityLegislationReviews>.

[610] See, e.g., Law Council Report 2008. This view, along with a number of the concerns listed below, was also separately advanced by a number of the Law Council's constituent bodies, see for example Law Institute of Victoria Submission, *UN Special Rapporteur Report on Australia's human rights compliance while countering terrorism* (03 May 2007); Law Institute of Victoria Submission, *Parliamentary Joint Committee on Intelligence and Security's Security Legislation Review* (05 July 2006).

has failed to demonstrate that there is a sufficient terrorism threat to Australia that warranted the introduction of extraordinary changes to the criminal law. It also did not show that the legislative amendments were suitable to address the threat. Given that the new laws radically departed from key principles of criminal justice, proper consideration would have been all the more important. Yet, the legislation was rushed through Parliament without adequate debate. Similarly, the consultation time that was set for the public to make submissions ran for a mere six working days. It is difficult to see how this extraordinarily short period provided adequate time for consideration of a package of bills totalling 120 pages. Once enacted, the Howard government ignored recommendations made by two bi-partisan committees on how to address significant shortcomings of the legislation. In particular, it disregarded any proposal to appoint an independent reviewer who would report on the operation of the laws on an annual basis. These procedural shortcomings raise serious concerns in relation to the requirements of a proportionate approach to legislative reform.

Aside from the procedural inadequacies, the content of the enacted legislation is equally problematic and hardly proportional to the terrorism threat to Australia. The Australian definition of "terrorist act" is wider in scope than the provision in the British *Terrorism Act 2000*. It also goes beyond internationally accepted definitions of terrorism. Likewise, the far-reaching proscription powers of the Attorney-General and the lack of adequate judicial review raise serious concerns in relation to the rule of law. It can be argued that they effectively enable the federal government to determine who can participate in the political sphere and who cannot.[611] Organisations can be outlawed on the dubious grounds of "security" and "advocating" terrorism, terms that lacks any specific definition in the legislation.[612]

2. The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 (Cth)

The second cornerstone of Australia's new anti-terrorism laws was the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (Cth). Its main purpose was to authorise the detention by ASIO, Australia's domestic intelligence agency, of persons for questioning in relation to terrorism offences, as well as the creation of new offences in respect to withholding of information regarding terrorism. The ASIO Bill was first introduced into the House

[611] See also Hocking, "Counter-Terrorism and the Criminalisation of Politics," 368.

[612] The Attorney-General's proscription powers constitute an elevation of executive power that resembled Prime Minister Robert Menzies' Communist Party Dissolution Act 1950 in its banning of political organisations by executive decree. The Communist Party Dissolution Act, however, was declared invalid by the Australian High Court in 1951; see also Williams, "Australian Values and the War against Terrorism," 191-99.

of Representatives at 5.51 p.m. on 21 March 2002, the final day of the Parliament's autumn sitting period. In his second reading speech, Attorney-General Williams repeated many of the remarks he had made introducing the first package of anti-terrorism legislation nine days earlier.[613] He noted that it was "important that, six months after the events of September 11, Australia does not forget the catastrophic results that terrorism can produce."[614] While the measures proposed by the ASIO Bill were "extraordinary, (...) so too is the evil at which they are directed."[615] According to the Attorney-General, it was therefore necessary to enhance the powers of ASIO to investigate terrorism offences "in order to ensure that any perpetrators of these serious offences are discovered and prosecuted, preferably before they perpetrate their crimes."[616] What the Attorney-General failed to explain, however, was how the practice of prosecuting perpetrators *before* they perpetrated their crimes was compatible with fundamental principles of the rule of law.[617]

After Williams had finished his speech, Parliamentary debate was adjourned and the Bill referred to the Parliamentary Joint Committee on ASIO, ASIS and DSD (PJCAAD) for consideration and an advisory report by 3 May 2002. On the same day the Senate referred the Bill to the Legal and Constitutional Legislation Committee (SLCLC) for inquiry and report, also by 3 May 2002. The reporting dates for both Committees were subsequently extended. The PJCAAD presented its report on 5 June 2002,[618] the SLCLC on 18 June 2002.[619] Referring to the Bill as "the most controversial piece of legislation ever reviewed," the PJCAAD noted that most of the submissions made to the inquiry were fundamentally opposed to the provisions in the Bill.[620] In particular, it reported that most submissions expressed serious concern about the proposed arrangements for detention incommunicado of non-suspects for up to 48 hours in the first instance with possible extension of up to 6 days and possibly more.[621] Other criticisms focussed on the on the proposal that persons in custody would not be able to rely on their right to silence of silence. In addition, the Committee stated that many submissions expressed unease about the proposed arrangement that detained

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[613] Commonwealth of Australia, *Parliamentary Debates*, *House of Representatives*, 21 March 2002, 1930ff (Daryl Williams). He stated, for instance, that "the horrific and tragic events of September 11 marked a fundamental shift in the international security environment. That day showed us that no country is safe from the devastation that can be inflicted by terrorism."

[614] Ibid.

[615] Ibid, 1932.

[616] Ibid, 1930.

[617] Critics subsequently argued that the legislative proposals were "rotten to the core" and would establish "part of the apparatus of a police state." See eg George Williams, "Why the ASIO Bill is Rotten to the Core," *The Age* (Melbourne), 27 August 2002.

[618] Parliament of Australia, Parliamentary Joint Committee on ASIO, ASIS and DSD, An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002, 5 June 2002; [hereinafter "PJCAAD, ASIO Bill Report"].

[619] Parliament of Australia, Senate Legal and Constitutional Legislation Committee, Consideration of Legislation Referred to the Committee Provisions of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002, 18 June 2002; [hereinafter "SLCLC, ASIO Bill Report"].

[620] PJCAAD, ASIO Bill Report, 1.

[621] Ibid, 29ff.

persons would have to produce information upon request and would have an evidentiary burden in proving that they do not have the requested information.[622] As a consequence, the PJCAAD adopted 15 recommendations proposing that the Bill be revised substantially. Similarly, the SLCLC agreed "that the new powers proposed in the Bill represent a fundamental and serious change to the cultural approach to law enforcement" and that "this change is viewed with concern by many in the community."[623] The Committee noted further that it found "itself in agreement with the view expressed by the PJCAAD."[624]

The Government's response in the House of Representatives was lukewarm.[625] While accepting some of the report's recommendations, the Government insisted on retaining the Bills key features including detention of non-suspects, detention incommunicado, detention of children as young as 14, and unlimited operation of the legislation without any sunset clause. The revised bill was subsequently referred back to the Senate. The Senate, in reply, noted "with concern" that the Government's responses to the PJCAAD were "inadequate", and, on 21 October 2002, referred the revised Bill to yet another committee, the Senate Legal and Constitutional References Committee, for inquiry and report by 3 December 2002.[626] This Senate Committee received 435 submissions and adopted no less than 27 recommendations. Many of those recommendations re-affirmed some of the key findings and proposals made by the PJCAAD in relation to the operation of the detention and questioning regime including that it only applied to people over the age of 18, that legal representation was available to detained/questioned people at all times and that the legislation was subject to a three-year sunset clause.[627]

The Bill was brought before the House of Representatives again on 12 December 2002, the last day before the parliamentary Christmas and summer recess. There followed a bitter 27-hour parliamentary debate and an extraordinary stand-off between the House of Representatives, dominated by the Government coalition, and the Senate, controlled by the Labor Opposition. Throughout the night, the revised versions of Bill went back and forth between the two houses of Parliament but the parties failed to reach agreement. The Government insisted on key features of the original Bill and accused Labor of wearing the blame for any blood spilt in a terrorist attack that occurred because of the deadlock. As the Prime Minister put it, "if this bill does not go through and we are not able to clothe our intelligence agencies with this additional authority over the summer

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[622] Ibid.
[623] SLCLC, ASIO Bill Report, 6-7.
[624] Ibid, 7.
[625] Commonwealth of Australia, *Parliamentary Debates*, *House of Representatives*, 23 September 2002, 7054-57 (Daryl Williams).
[626] Parliament of Australia, Senate Legal and Constitutional References Committee, Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters, 3 December 2002, 1.
[627] Ibid, 137ff.

months it will be on the head of the Australian Labor Party and on nobody else's head."[628] Similarly, for the Attorney-General the Bill had "become a test of commitment to the security of the nation."[629] Daryl Melham of the Labor Party, on the other hand, maintained that Australia was not "General Pinochet's Chile" and did not "pinch our citizens off the street" to keep them "incommunicado with no lawyers."[630] While Labor was prepared to adopt the Bill subject to the revisions recommended by the parliamentary committees, Melham found it an "utter disgrace" for an "Attorney-General, the first law officer of the country, to come into this parliament to argue for a secret detention regime for non-suspects."[631] Despite the intensive negotiation, no consensus was reached between the parties. In the morning of 13 December 2002, the Senate rejected the latest version of the Bill and, on 12.42 pm, the House of Representatives adjourned with resentment on both sides.[632]

Following the Christmas and summer holiday recess Parliament resumed in early February 2003. At that time, however, the supposedly very important ASIO Bill had slid off the Government's public and parliamentary agenda. Despite the urgency to adopt the Bill in the previous December to ensure a "safe Christmas" for all Australians, the Government did not provide any indication on how it intended to proceed with the legislation. It was not until the 20 March 2003 – six weeks after Parliament had resumed, and more than three months after the Senate had rejected the original Bill – that the Bill re-surfaced in the House of Representatives. This delay was, perhaps, not unintended. It presented the Government with the opportunity to pressure the Labor-dominated Senate with the possibility of a double dissolution election.[633] The delay also meant that the Bill would not come on for scrutiny in the Senate until the budget session, commencing on 13 May 2003, with substantive debate unlikely before the two sitting weeks commencing 16 June 2003. And indeed, it was not before the 17 June 2003 that the new Bill was debated in the Senate.

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[628] The Hon John Howard, MP, Press Conference, Canberra, 13 December 2002.
[629] Commonwealth of Australia, *Parliamentary Debates*, *House of Representatives*, 12 December 2002, 10562 (Daryl Williams).
[630] Ibid, 10534-5 (Daryl Melham).
[631] Ibid, 10433 (Daryl Melham).
[632] Ibid, 10571: Mr ABBOTT (Warringah—Leader of the House) (12.42 p.m.): After 27 hours of occupational therapy for an irrelevant opposition, I move: That the House do now adjourn. Mr FERGUSON: You are a dog, Abbott, just a dog. You are nothing but a dog. The SPEAKER: The member for Batman. Mr FERGUSON: You are nothing but a dog. The SPEAKER: The member for Batman will withdraw that remark. Mr FERGUSON: I withdraw it. He asked for it; he called for it. The SPEAKER: The member for Batman will resume his seat.
[633] A double dissolution is a procedure permitted under the Australian Constitution to resolve deadlocks between the House of Representatives and the Senate. Section 57 of the Constitution provides: "If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time."

The revised Bill contained a number of minor changes to the versions that were subject to the marathon debate of 12 and 13 December 2002. The amendments included the introduction of a partial three-year sunset clause (relating to division 3, part III of the Bill only), provided for an application to children of 16 years and over (in contrast to the previously prosed ages of 10 and 14 years), and removed the previously proposed specification of an initial 48-hour detention without a lawyer.[634] Nevertheless, the key features of the original Bill remained in place with the new version still providing for the detention of non-suspects without proper judicial review and without access to adequate legal representation.

What had changed, however, was the position of the Labor Party. Faced with the prospect of a double dissolution election and fearful of being seen as "soft" on terrorism and national security, Labor announced that it would support the government in the passage of the Bill, regardless of the outcome of the subsequent parliamentary debates and amendments. Issues that previously were intractable core concerns for Labor, were now no longer regarded as obstacles for Senate approval. Describing the proposed legislation as a "very different beast"[635] and "radically different"[636] senior Labor members in the House of Representatives found that "this ASIO bill now finally gets the balance right"[637]. Similarly, Labor Senators in the Senate now supported "strong security laws to protect the Australian people from international terrorist threats."[638] Declaring Labor's approval of the ASIO Bill, Senator John Faulkner claimed that:

> Gone is the denial of legal representation. Gone is the capacity for ASIO to hold someone indefinitely. Gone is the capacity for ASIO to hold someone in secret. Included is high-level judicial supervision (...).[639]

Yet, as Jenny Hocking observed, Labor's triumphant conversion was profoundly mistaken.[640] Technically, the Act as adopted still provides for prolonged – and possibly indefinite – detention of non-suspects in certain circumstances. In addition, a number of other substantive aspects of the Act that passed the Senate on 26 June 2003 and received Royal Assent on 22 July 2003 differed little from those of the original Bill. This has led the Law Institute of Victoria to describe the claimed

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[634] The proposed legislation still provided for the power to regulate "classes of persons" as "issuing authorities" and included a detention period of seven days with severely restricted access to independent legal representation.
[635] Commonwealth of Australia, *Parliamentary Debates*, *House of Representatives*, 26 June 2003, 17675 (Daryl Melham).
[636] Ibid, 17676 (Robert McClelland).
[637] Ibid, 17672 (Simon Crean).
[638] Commonwealth of Australia, *Parliamentary Debates*, *Senate*, 17 June 2003, 11669 (John Faulkner).
[639] Ibid, 11672.
[640] Hocking, *Terror Laws*, 227. As Hocking reports, it was quickly revealed, following questions in the Senate by the Greens Senator Bob Brown, that the amended Bill could indeed still allow for indefinite detention through a series of rolling warrants each of seven days duration. Hocking generally argues that the intense and confused debate surrounding the ASIO Bill, already characterised by widespread dissembling and obfuscation, continued during the final parliamentary consideration and that the Labor Party contributed to the government's pattern of misrepresentation over the details of the Bill; see 227-230.

improvements as "a cruel trick and illusory."[641] The ASIO Act's key provisions will now be subject to closer examination.

a) The Detention and Questioning of Non-suspects

The legislation as enacted authorises ASIO to seek a warrant to detain and question people for a maximum time of seven days. In contrast to comparable legislation in the United Kingdom,[642] Canada[643] and the United States,[644] the person detained does not need to be suspected of any offence. People can be taken into custody without charges being laid or even the possibility that they might be laid at a later stage. According to s. 34D(1) of the Act it is sufficient that the "issuing authority" has "reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence." An "issuing authority" is defined as a person, appointed by the Minister, who is a federal magistrate or judge, or a member of another class of people nominated in regulations.[645] These arrangements differ significantly from those in other Western liberal democracies. In Canada, for instance, orders for so-called investigative hearings must be made out by a regular judge who is independent from the executive.[646]

The warrant issued by the "issuing authority" either requires a person to appear before a "prescribed authority" to provide information or produce records or things or authorizes a police officer to take the person into custody and bring him or her before a "prescribed authority" for such purposes. According to s. 34B, the "prescribed authority" may be a retired superior court judge or a President or Deputy President of the Administrative Appeals Tribunal. While a single warrant must not exceed 48 hours, it is possible to extend detention by requesting successive warrants. In total, the successive extensions may not result in a continuous period of detention of more than 168 hours (seven days) from the time the person first appeared before any "prescribed authority" for questioning under an earlier warrant.[647] However, the Act does not contain adequate safeguard

[641] Law Institute of Victoria, "ASIO Bill changes are illusory", Media Release 12 June 2003, <http://www.liv.asn.au/media/releases/20030612_asio.html>.
[642] Terrorism Act 2000 (UK), <http://www.hmso.gov.uk/acts/acts2000/20000011.htm>; Anti-terrorism, Crime and Security Act 2001 (UK), <http://www.hmso.gov.uk/acts/acts2001/20010024.htm>. For an analysis of the British anti-terrorism legislation see e.g. Clive Walker, *Blackstone's Guide to the Anti-Terrorism Legislation*, (Oxford: Oxford University Press, 2nd ed. 2009); Helen Fenwick, "*The Anti-Terrorism, Crime and Security Act 2001*: A Proportionate Response to 11 September?" *Modern Law Review* 65, no. 5 (2002) 724-62.
[643] Anti-Terrorism Act (Bill C-36) (S.C. 2001, c. 41)
<http://www.parl.gc.ca/37/1/parlbus/chambus/house/bills/government/C-36/C-36_4/C-36TOCE.html>.
[644] USA Patriot Act 2001, PubL No 107-56, § 41, 115 Stat 272 (2001), <http://www.lifeandliberty.gov/>.
[645] s. 34AB.
[646] Anti-Terrorism Act (Bill C-36) (S.C. 2001, c. 41), s. 83.28 (1), s. 83.3.
[647] s. 34F(4)(aa).

provisions in relation to the issuance of so-called serial warrants (persons are released and detained again shortly afterwards in order to refresh the detention period). As a consequence, there is the possibility that although a detainee must be released after 48 hours or 7 days, he/she may be taken into custody again as soon as an hour later. The only criterion to be satisfied is that the new warrant is based on "materially different" information to any previous warrants.[648]

b) The Detention and Questioning of Children

The ASIO Act also permits detention and questioning of children, and, in certain circumstances, even allows for them to be strip searched.[649] The original Bill had allowed for the detention of children as young as 10 years of age while subsequent proposals had advocated the application of the legislation to persons between 14 and 18. The Act as adopted only applies to children of 16 years and over and permits detention only if there are "reasonable grounds that it is likely that the person will commit, is committing or has committed a terrorism offence". In contrast to the detention and questioning provisions that apply to adults, children can thus only be detained and questioned if they are suspected of being involved in terrorist activity.

Nonetheless, the detention and questioning regime as it applies to children raises ethical concerns and also engages essential provisions of the UN Convention on the Rights of the Child [hereinafter CROC] to which Australia became a party in 1991. In particular, they are problematic in relation to Article 37 of the CROC which provides that no child should be deprived of his or her liberty arbitrarily and that any detention should be used only as a "measure of last resort" and for the "shortest appropriate period of time." Furthermore the detention of children violates Article 40 of the CROC which states that any child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance and shall be presumed innocent until proven guilty.[650]

[648] s 34 D(1a)(b)(i).
[649] s 34NA.
[650] In addition, the ASIO Act may be in breach of Articles 2(2), 3(1) and 19(1) CROC. Article 2(2) provides that a child must not be discriminated against on the basis of the expressed opinions of their parents. Article 3 (1) provides that in all actions concerning children the best interests of the child shall be a primary consideration. Article 19(1) provides that the State must take all appropriate measures to protect the child from all forms of injury or abuse.

c) The Lack of Judicial Review and the Severe Restriction of Legal Representation

Under the Act, the detention decision is not subject to regular judicial review. In fact, the detention is only overseen by a "prescribed authority." As indicated, a "prescribed authority" is either a retired superior court judge or a President or Deputy President of the Administrative Appeals Tribunal (AAT). The AAT, however, is not a regular judicial body which is independent from the executive. Its members are so-called *personae designatae* who are dependant on the favour of the executive if they wish to be reappointed. These provisions raise serious concerns in relation to the fundamental right of habeas corpus. Persons detained under the provisions of the ASIO Act cannot have the detention warrant examined by a court of law. Hence, it may be argued that the detention arrangements under the ASIO Act violate the well-established principle of the prohibition of arbitrary detention because they deny a detainee the essential right to due process.

These arrangements are also problematic in relation to Australia's obligations under international law, specifically with commitments under the United Nations *International Covenant on Civil Political Rights* [hereinafter ICCPR] to which Australia became a party in 1980.[651] Article 9 (1) of the ICCPR specifically provides that "everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention." Referring to the ICCPR's *travaux préparatoires*, Manfred Nowak has pointed out that the term "arbitrary" is not to be equated with "against the law" but includes elements of injustice, unpredictability, unreasonableness, capriciousness and unproportionality.[652] Confirming this interpretation, the UN Human Rights Committee (the quasi-judicial monitoring organ established by the ICCPR) has stated in the case of *Van Alphen v The Netherlands* that detention "must not only be lawful but reasonable in all the circumstances" and "must be necessary in all the circumstances, for example to prevent flight, interference with evidence, or the recurrence of a crime."[653] It is difficult to see how the detention of non-suspects for the mere purposes of questioning and intelligence gathering can be regarded as "necessary and reasonable in all the circumstances." Even in circumstances where detention for questioning purposes is considered to be indispensable, there is no clear reason why such detention should not be strictly confined to those reasonably suspected of being terrorists or being involved in terrorist activities.[654]

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[651] As Australia does neither have a Bill of Rights nor a constitution codifying human rights and civil liberties, international instruments such as the ICCPR are particularly relevant for the protection of human rights and fundamental freedoms.

[652] Nowak, *CCPR Commentary*,178.

[653] *Van Alphen v The Netherlands* (1990) HRC Comm No 305/1988, UN Doc A/45/40 at para 5.8.

[654] The lack of judicial review has been described by the UN Special Rapporteur, Martin Scheinin, as a matter of "grave concern", see Scheinin Report, 18.

The ASIO Act also severely limits the right to legal representation. While the person subjected to a warrant is permitted to contact a lawyer of his/her choice,[655] questioning may commence in the absence of that lawyer if permitted by the "prescribed authority".[656] The contact between lawyer and detainee is monitored by a "person exercising authority".[657] Also, a lawyer may not intervene in the questioning of the person nor address the prescribed authority before whom the person is being questioned, except to request clarification of an ambiguous question.[658] In fact, if the prescribed authority considers the lawyer's conduct is unduly disrupting the questioning, the authority may direct a person exercising authority under the warrant to remove the legal adviser from the place where the questioning is occurring.[659] Finally, a lawyer commits an offence (5 years imprisonment) if he/her communicates information to an "unauthorised third person" about the detention or questioning.[660] These arrangements constitute a departure from fundamental principles of due process. In essence, these provisions prevent lawyers from fulfilling their regular professional duties. As Gavan Griffith, QC, a former Commonwealth Solicitor General, has put it:

> The function of the qualified legal representation is limited to that of an excluded onlooker, confined merely to ensuring that the questions asked are understandable, and at risk of removal from the interrogation process for any interruption. Such truncated rights of legal representation are of such nominal content that it would male little difference if the Act said plainly what it does, and provide that there be no right of legal representation. Such is its real operation and effect.[661]

d) The Privilege against Self-incrimination

The ASIO Act challenges the privilege against self-incrimination, a fundamental principle in any modern legal system. Section 34G of the ASIO Act establishes offences (punishable by up to five years imprisonment) for failing to give "the information, record or thing" requested in accordance with the warrant. "Strict liability" attaches to this offence and the detainee bears the burden of proof to establish that he/she does not have the information sought.[662] In effect, these provisions remove the fundamental right to silence and reverse the onus of proof. Moreover, while the Act protects the detainee against "direct" use of answers in criminal proceedings against him/her (except in

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[655] s 34C(3B).
[656] s 34TB.
[657] s 34U(2).
[658] s 34U (4).
[659] s 34U(5).
[660] ss 34U(4), 34U(7).
[661] Gavan Griffith, Submission to the Senate Legal and Constitutional References Committee (Submission 235), 12 November 2002, 11.
[662] For "strict liability", see *Criminal Code Act* (Cth), s 6.1.

proceedings for an offence against s. 34G), it does not provide protection from "derivative" use of any answers in future proceedings. This means, for example, that if the police find evidence related to the person's answers during questioning (e.g. by later finding incriminating material at the person's premises), this evidence may be used against the person in criminal proceedings.

Section 34G of the ASIO Act is also problematic in relation to Australia's obligations under international law because it engages the non-derogable right to be presumed innocent until proved guilty. This right is enshrined in Article 14(2) of the ICCPR and also recognised by Article 11 of the Universal Declaration of Human Rights. Article 14(3)(g) of the ICCPR further clarifies that the accused has the right "not to be compelled to testify against himself or to confess guilt." One may argue that the detention of persons by ASIO for the purpose of questioning can be regarded as an "administrative hearing" and is therefore different from "regular" arrest and detention by law enforcement agencies. As a consequence, the limits set by the ICCPR would not apply to non-judicial detention for questioning purposes. In *Saunders v United Kingdom*, however, the European Court of Human Rights expressly stated that it was a violation of the right to a fair trial to admit evidence which had been obtained at an earlier administrative hearing during which the accused had been compelled by statute to answer questions and adduce evidence of a self-incriminatory nature.[663]

e) The Prohibition to Disclose Information

While section 34G criminalises failure to give "the information, record or thing" requested in accordance with the warrant, section 34VAA prohibits disclosure of information relating to the issuing of a warrant and "operational information". For as long as a warrant is in force, it is an offence to disclose information about its content, its having been issued or about the detention or questioning of a person in connection with the warrant. Until two years after a warrant has expired it is an offence to disclose "operational information". This is defined to mean information that ASIO has or had, a source of information (other than the person specified in the warrant) that ASIO has or had, and an operational capacity, method or plan of ASIO.

This provision raises serious concerns in relation to freedom of information as it hinders, *inter alia*, the work of the press. This in turn has negative implications for the accountability of ASIO. In addition, the prohibition on the disclosure of information can be criticised on the grounds that it is unlikely to prove particularly effective. As Nick O'Neill, Simon Rice and Roger Douglas have

[663] *Saunders v United Kingdom* (1996) 23 EHRR 313.

observed, its questionable effectiveness stems mainly from the likelihood that many potential offenders will be unaware of its contents.[664] Moreover, the provision is problematic in that it catches behaviour which is unlikely to threaten national security. This behaviour includes gossips and worried family members who talk about someone's having been detained or taken in for questioning. As such, the provision unduly privileges security interests in monopolised information over freedom of political communication.[665]

f) Parliamentary Review

The Government initially rejected the idea of subjecting the ASIO Bill to any sunset clause arguing that the extraordinary legislation needed to be permanent since the "terrorists are not going to just give up and the threat is not going to go away.[666] However, in June 2003, it conceded this point and the legislation was adopted with a partial three-year sunset clause relating to division 3, part III of the Act, i.e. the part of the legislation that provided for ASIO's questioning and detention powers. The review was conducted by the PJCAAD in early 2005.[667] The Committee, which in December 2005 was re-named the Parliamentary Committee on Intelligence and Security (PJCIS) tabled its report on 30 November 2005. Noting the controversial nature of the powers and the strong opposition to their introduction from a range of stakeholders in the community, PJCIS made a number of recommendations for reform, some of which were subsequently adopted.[668] Several important recommendations, however, including those that recommended confidential access to legal representation of a person's choice, were not incorporated into the Act.

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[664] Nick O'Neill, Simon Rice and Roger Douglas, Retreat from Injustice: Human Rights Law in Australia (Sydney: Federation Press, 2nd ed. 2004) 271.

[665] Ibid.

[666] Commonwealth of Australia, *Parliamentary Debates*, *House of Representatives*, 23 September 2002, 7055 (Daryl Williams). Williams further stated: "In the government's view, there is no justification for the bill to be subject to a sunset clause. The international and domestic security environment has changed forever, and we cannot say for certain at what point in time, if any, the provisions of the bill will no longer be necessary. (...). Terrorists are not going to just give up and the threat is not going to go away. Just because terrorists have not acted in the past year does not mean that they lack the capability or the intent to do so. The best way to prevent the horror of a terrorist attack in Australia is to ensure that we do not allow the circumstances to exist in which a terrorist attack could succeed. We cannot become complacent after three years and expose ourselves to a higher level of risk. (...)." Ibid.

[667] Parliament of Australia, Joint Committee on Intelligence and Security, ASIO's Questioning and Detention Powers – Review of the operation, effectiveness and implications of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979, Report, 30 November 2005.

[668] Structurally, the most obvious amendment to the ASIO Act brought about by this legislation is to clearly distinguish between questioning only warrants, and warrants which provide for both questioning and detention. This makes the procedures for the two different processes easier to understand and apply. The Act also clarified the rights of persons questioned or detained under the ASIO warrants regime by including an explicit right for a subject to contact a lawyer, a statutory right to apply for financial assistance relating to the questioning proceedings, and better facilitation of the subject's ability to make complaints to the IGIS, the Commonwealth Ombudsman, or a State or Territory complaints body.

Another significant point of departure between the Committee and the Government was the duration of the sunset clause. 110 of the 113 submissions received by PJCIS argued for the re-introduction of a sunset clause. The PJCIS also suggested that a further review of the legislation should be conducted by 22 June 2011 the latest. In response, the Attorney General, Philip Ruddock, in his second reading speech of the ASIO Amendment Bill 2006 on 29 March 2006, stated that "the government accepts the PJCIS's arguments about the need for ongoing review and a further sunset period, but considers that the 5½-year period recommended by the PJC is insufficient in the current environment."[669] He noted that the Government considered "a period of 10 years to be more appropriate" and declared that this 10-year period was "consistent with state and territory government views about the time needed to properly make an assessment of the recently enacted antiterrorism package of legislation."[670] What Ruddock did not explain, however, was why a period of 5½ years was considered to be insufficient while at the same time 10 years were regarded to be appropriate. He also did not elaborate on what the Government understood the "current environment" to be, what the implications of the "current environment" were in relation to parliamentary review, and why it would take as long as 10 years to properly assess the operation of the legislation.

The Bill was then considered by the Senate. During the debate, the proposed 10-year sunset clause was heavily criticised by members of the opposition. Veteran Labor Senator Robert Ray, for instance, considered the proposal a "total joke."[671] Nonetheless, the Bill passed the Senate on 13 June 2006 and received Royal Assent on 19 June 2006. The easy passage was made possible by the fact that the Government had obtained control of the Senate in the 2004 federal election. This meant that in contrast to 2002 and 2003 – when the original ASIO Act was repeatedly frustrated by the Labor majority in the Senate – the Opposition was no longer able to block the legislation. As enacted, the ASIO Amendment Act 2006 extended the existing sunset provision applying to Division 3 of Part III of the ASIO Act until 22 July 2016, and requires that the PJCIS conduct a review by 22 January 2016. This 10 year-extension was also met with disapproval from a range of stakeholders outside Parliament. In particular, it drew strong criticism from the legal profession. John North, the president of the Law Council of Australia, for instance, told the ABC that the Government had not justified the continuation of the powers. He noted that "the Law Council is very surprised that they have put in a 10-year sunset clause when they have not yet since 2002 used

[669] Commonwealth of Australia, *Parliamentary Debates*, *House of Representatives*, 29 March 2006, 6 (Philip Ruddock).
[670] Ibid.
[671] Commonwealth of Australia, *Parliamentary Debates*, *Senate*, 13 June 2006, 135 (Robert Ray).

the detention power under this act."[672] ASIO, he added, "should not be involved in police work, it should gather intelligence, not arrest possibly innocent Australians."[673]

g) Proportionality

The arrangements established by the ASIO Act raise serious concern and are highly disproportionate to the threat of terrorism faced by Australia. The legislative amendments provided ASIO with a level of power and authority that the American FBI – which, arguably, has a more substantial terrorist threat to deal with – could only dream about. In fact, Australia is the *only* Western country which has legalised the detention of non-suspects (including children) without access to regular judicial review. Unless one accepts that Australia is facing a higher threat of terrorism than any other democratic nation, it is difficult to see how these measures can be considered to be proportionate. A further aspect of the legislation's disproportionality lies in the fact that the legislative amendments are incompatible with Australia's obligations under international law. In particular, many of the ASIO Act's provisions raise concern in relation to responsibilities under the International Covenant on Civil and Political Rights, an instrument that nonetheless allows for the restriction of human rights in times of emergency.

In addition to the problematic nature of the legislative provisions themselves, the ASIO Act amendments fail to fulfil the requirements of proportionality because they do not provide for adequate parliamentary review. In the absence of judicial review, parliamentary oversight becomes all the more important, not least as the nature and scope of the threat of terrorism are dynamic and may change over time. Yet, the Howard government opposed the introduction of a sunset clause from the outset. While it eventually agreed to a 3-year sunset clause in 2003, it extended the operation of the legislation for 10 year sunset in 2006. This effectively turned exceptional arrangements into quasi-permanent features of the Australian legal landscape. The disproportionality of these measures is brought into even starker contrast by comparison with the arrangements introduced in the United Kingdom in response to the London bombings of July 2005. These British anti-terrorism laws were subject to a one-year review.

The necessity and proportionality of the ASIO Act is further called into question by the Australian government's refusal to agree to a number of recommendations made by no less than three bi-partisan parliamentary committees. In the December 2002 debate, Labor members repeatedly

[672] John North quoted in Dale Mills, "ASIO detention powers to be extended," *Green Left Weekly* 663 (5 April 2006) <http://www.greenleft.org.au/2006/663/6959>.
[673] Ibid.

signalled their preparedness to pass the proposed legislation with minor amendments which would have even preserved a number of problematic key features of the legislation, including the detention of non-suspects. Yet, the Coalition did not settle for this compromise. Instead, the Bill was laid aside and the Government waited another four months before re-introducing it into Parliament. This delay meant that the legislative proposals were exploitable as political tool to pressure Labor with the threat of a double dissolution election. Rather than constituting a sensible and proportional approach to security policy the Government's "tactical" postponement of the legislation points to a preparedness to play politics with terrorism and national security. It also casts doubt on whether the Government genuinely believed that the measures were essential to counter the threat of terrorism.

As with the case of the *Security Legislation Amendment (Terrorism) Act 2002* (Cth), it is in fact questionable whether the ASIO Act amendments had (and have) a positive effect on security. One of the key security objectives of the legislation was to avoid the "tipping off" of those involved in terrorist acts. Nonetheless, it remains unclear whether this objective enhances security in practice. For example, even if no one is present when the person of interest is arrested by ASIO, it is unlikely that the person's continued absence will go unnoticed and unremarked. If the person is indeed involved in terrorism or associated with those who are so involved, it is likely that the person's arrest and/or disappearance will soon become known to other people who are involved, and that they will assume that the most likely reason is ASIO's suspicion that the person can help with its inquiries.

Also, even if the new powers were to be useful, it is conceivable that their exercise may undermine the capacity of ASIO to inspire the trust necessary to arouse the kind of voluntary co-operation which is considered to be crucial in the gathering of intelligence. Indeed, as will be shown in Chapter 6, the increased powers have generated a growing disinclination among Arab and Muslim Australians to provide information and trust the intelligence and law enforcement agencies.

IV. Conclusion

The foundation of Australia's new legislative counter-terrorism framework was laid in the two years following 9/11. This period saw the expansion of traditional criminal law to include broadly framed terrorism offences as well as executive proscription powers in relation to organisations considered to be "terrorist" or "advocating" terrorism. In effect, these legislative amendments established a second tier in Australia's criminal justice system with excessive penalties and limited parliamentary review. In addition, ASIO was given wide detention and questioning powers that

even apply to non-suspects and which are not subject to judicial review. This regime remains highly problematic, not least because it vests a domestic intelligence agency with powers of arrest and detention which in Australia were traditionally held by the law enforcement agencies.[674]

The legislative amendments were considered necessary as Australia previously had no laws in place that specifically dealt with terrorism. This did not mean that the existing legal system was inadequately equipped to cope with terrorist violence as there already existed a wide range of offences covering conduct generally associated with terrorism. Even if one accepts that new legislation was warranted, the Government failed to demonstrate the need for extensive legal reform. It also did not establish that the new laws were proportionate to the terrorist threat. Furthermore, inadequate parliamentary review has meant that extraordinary measures that were initially described as temporary have effectively become permanent features of the law.

The disproportionality of the Government's response to the threats associated with terrorism also extended to the processes of legislative reform itself. From the outset, recommendations from bi-partisan parliamentary and independent committees for improving the proposed legislation were incorporated by the Government only to a very limited extent. After the Coalition gained control of the Senate in the 2004 federal election, such recommendations were ignored altogether. However, it would be inaccurate to place the blame for the flawed legislative amendments on the Government alone. Even while holding the majority in the Senate, the Labor Party consented to pass ill-conceived and disproportionate legislation partly because it feared being seen "soft" on terrorism and national security. Perhaps most concerning, however, it remains unclear whether the wide-ranging laws are suitable and effective to address the threat of terrorism.

[674] ASIO was specifically created to be separate from the police. Its sole task was to gather information and produce intelligence that enables the agency to warn the government about activities or situations that might endanger Australia's national security. The ASIO Act defines "security" as the protection of Australia and its people from espionage, sabotage, politically motivated violence, the promotion of communal violence, attacks on Australia's defence system, and acts of foreign interference.

6

THE POLITICISATION OF AUSTRALIA'S COUNTER-TERRORISM LAW AND POLICY

I. Introduction

II. The Willie Brigitte Affair

III. The Jack Roche Case

IV. The Bilal Khazal Bail Hearing

V. The Aftermath of the 7/7 London Bombings

1. The Anti-Terrorism Act [No. 1] 2005 (Cth)

2. The Anti-Terrorism Act [No. 2] 2005 (Cth)

3. Proportionality

VI. Conclusion

I. Introduction

In early 2003, much of the world's attention focussed on the looming US-led invasion of Iraq. In Australia, too, the Iraq crisis received considerable attention, both in Canberra and amongst the public at large. Australian troops had already left to the Middle East on "forward deployment" and the Howard government strongly supported the Bush administration's hardline stance towards Saddam Hussein's Iraq. On 28 January 2003, the US President delivered his State of the Union speech claiming, inter alia, that Iraq had sought a quantity of uranium from Africa. Echoing the Africa uranium claim, Prime Minister Howard outlined the Australian government's position to Parliament a few days later and hinted at Canberra's readiness to join U.S.-led military operations against Iraq, even without the support of the United Nations. The Australian public did not match the Government's enthusiasm for military action with more than three-quarters of the population opposed to non U.N.-sanctioned use of force.[675] Nonetheless, the invasion of Iraq commenced on 20 March 2003, and the Australian Defence Force confirmed that SAS troopers were engaging in hostilities.[676] The Iraqi defences were soon overrun and, in May 2003, President Bush, posing on an aircraft carrier in front of a banner proclaiming "Mission Accomplished", declared "major combat operations" in Iraq to be over.[677]

With much of Canberra's attention focused on domestic issues, and a federal election nearing in 2004, Prime Minister Howard considered his own political future. By June 2003 Howard's mind was made up and he announced his intention to contest the next federal election, leaving a deeply disappointed leader-in-waiting, Peter Costello, contemplating his prospects.[678] 'National security' and 'terrorism' were generally seen as ballot-winning issues in this election and so the Government carefully created an image of itself as "tough on terrorism". From late 2003 to late 2005, the Government enacted a range of further anti-terrorism laws. The laws that were enacted in late 2003 and throughout 2004 were mainly triggered by three incidents – the Willie Brigitte Affair, the Jack Roche case and the Bilal Khazal bail hearing – which exposed failures in intelligence sharing and communication and had the potential to embarrass the Government in the lead up to the 2004 federal election. These incidents as well as the ensuing response by the Government are the subject of closer analysis in this chapter. It is argued that rather than demonstrating a coherent approach to legislative reform, these cases were distinctive elements of the Howard government's overt political

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[675] James Norman, *Bob Brown: Gentle Revolutionary* (Sydney: Allen & Unwin, 2005) 202.

[676] ABC TV Program Transcript, Insiders, SAS behind enemy lines in Iraq, 23 March 2003, <http://www.abc.net.au/insiders/content/2003/s814255.htm>.

[677] "Commander in Chief lands on USS Lincoln," *CNN News (Online)*, 2 May 2003.

[678] "PM decides to stay," ABC Radio National, Transcript PM Programme, 3 June 2003; <http://www.abc.net.au/pm/content/2003/s871302.htm>.

approach in shifting responsibility for, and in seeking remedy of a national security administrative and policy failure through the expansion of the legislative counter-terrorism framework.

The 2004 federal was won comfortably by Howard with the Coalition gaining control over both houses of Parliament.[679] This control meant that the Labor opposition was no longer in a position to block legislation in the Senate. Yet, it was not until the latter half of 2005 that the Government relied on this control to push legislation though Parliament. Among the most controversial laws were the *Anti-Terrorism Acts [No. 1 and 2] 2005* (Cth). These Acts broadened the scope of criminal liability significantly and established highly controversial control order and preventative detention regimes. This chapter will seek to demonstrate that the Government was prepared to play politics with terrorism in order to pursue its partisan legislative agenda and to divert public attention from unpopular proposals such as changes to Australia's industrial relations. Its further purpose is to illustrate that the drama accompanying the Anti-Terrorism Acts' expedited passage through Parliament was largely typical of the legislative process which has underpinned Australian counter-terrorism law and policy under the Howard government: terrorism-related matters were legislated in great haste and legislative proposals were presented with adequate opportunity for scrutiny, public input and useful debate. It is argued that this process, however, led to inferior ant-terrorism legislation that failed to meet the requirements of necessity and proportionality.

II. The Willie Brigitte Affair

Willie Brigitte was born on the Caribbean island of Guadeloupe in 1968 and moved to Paris as a teenager in the 1980s. After dropping out of high school and deserting from the Navy he worked in general labouring occupations throughout the 1990s. In 1998, Brigitte converted to Islam, changing his name to Mohammed Abderrahman, or Abderrahman the West Indian. According to Radio Europe 1 correspondent, Alain Acco, it was around this time that Brigitte first became known to the Directorate for Territorial Surveillance (DST), the French security and counterintelligence service.[680] He regularly attended the Omar and Abou Bakr mosques in the poor and immigrant Paris suburb of Couronnes and allegedly associated with people who had links to the Salafist Group to Call and Combat, an Algerian-based extremist group. Subsequently, in 1999 and 2000, Brigitte and "carloads of bearded Muslims" were observed heading off on several "strenuous camping trips" in

[679] "Howard wins historic fourth term," *ABC News (Online)*, 10 October 2004; <http://www.abc.net.au/news/newsitems/200410/s1216791.htm>.

[680] Alain Acco's report was derived from what Brigitte is alleged to have told DST under interrogation. His account depended entirely on information supplied by an unnamed "senior member of the French police" and an equally anonymous "Parisian anti-terrorist magistrate". Acco's report was virtually the sole basis of the subsequent wave of sensational and embroidered media reports in Australia.

the Fontainebleau Forest just outside Paris. The group, dubbed "the camper group" by DST, was also seen departing for hiking excursions on remote Normandy beaches.[681]

Two years later, after 11 September 2001, DST reportedly noted that members of the same "camper group" were reappearing in Afghanistan fighting with the Taliban.[682] Brigitte apparently also headed for Afghanistan in late 2001. However, due to the US-led military campaign, he was unable to cross the Afghanistan-Pakistan border. Instead, he remained in Pakistan where he allegedly spent four months in a Lashkar-e-Taiba (LeT) training camp in the mountains of the Punjab.[683] According to transcripts of an interrogation conducted by French anti-terrorism magistrate Jean-Louis Bruguiere, Brigitte admitted his presence at the LeT complex near Lahore, Pakistan, in 2001-2002. He then returned to Paris, and, in May 2003, obtained a tourist visa to visit Australia where he arrived on 16 May.[684] Settling in a suburb in Sydney's south-west, Brigitte worked in a halal restaurant in the city. In August 2003, he married Sydneysider Melanie Brown, an Australian Muslim convert. His motives for travelling to Australia, however, remain subject to wild speculation.[685] According to ASIO Director-General, Dennis Richardson, "Brigitte was almost certainly involved in activities with the intention of doing harm in Australia."[686] Brigitte's lawyers claimed that their client "was off to Australia to start a new life."[687] However, when ABC TV correspondent Tony Jones directly asked the Australian federalAttorney-General whether he believed that Brigitte "was plotting some kind of terrorist action," his reply was simple and clear: "No".[688]

Brigitte's trip to Australia and his presence in Sydney were not initially noticed by either the French or the Australian security services. On 16 September 2003, however, DST reportedly confirmed, through a Paris travel agent, that Brigitte had bought a one-way ticket to Australia using his original French name. About six days later, on 22 September, the Australian Embassy in Paris received a letter from DST requesting confirmation that the Frenchman was still in Australia. Although the letter indicated that Brigitte was possibly a member of an Islamist group and that he had received military training in Pakistan, ASIO appears to have treated it as a routine trace request.

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[681] ABC, Transcript TV Program, Four Corners, "Willie Brigitte,";
<http://www.abc.net.au/4corners/content/2003/transcripts/s1040952.htm>.
[682] Ibid.
[683] Lashkar-e-Taiba, or LET, is a Pakistani group formed to fight for the liberation of Kashmir from India.
[684] ABC, Four Corners, "Willie Brigitte."
[685] David Wroe, "Ruddock restarts push for tougher law," *The Age* (Melbourne), 4 November 2003.
[686] ABC, Four Corners, "Willie Brigitte."
[687] Ibid.
[688] ABC, Transcript TV Program, Lateline, "Intelligence delay has Ruddock asking questions," 27 October 2003; <http:www.abc.net.au/lateline/content/2003/s976417.htm>

Some ten days passed and the French received no reply to their enquiry. Then, on Friday 3 October 2003, the French authorities sent a second message warning that Brigitte could be in Australia in connection with terrorism-related activity and that he was 'possibly dangerous'.[689] This time the information was sent directly to the ASIO headquarters, in Canberra. The intelligence communiqué arrived in Canberra at 11 p.m., a time at which ASIO's communications area was apparently closed for the weekend. Since the following Monday was a public holiday, it was not before Tuesday 7 September - three days later - that ASIO finally processed the message. Within two days, the Australian authorities located Brigitte and detained him for breaching his visa conditions. The newly adopted questioning and detention powers of the ASIO Act, however, were not invoked. Brigitte was subsequently deported to France on 17 October 2003.

The glaring failure of intelligence exchange and communication problems between the French and Australian authorities, resulting in a person with suspected links to an Islamic extremist organisation being granted a tourist visa, carried significant potential for political damage to the Government, particularly with a federal election a mere eleven months away. The topics of "national security" and "counter-terrorism" featured prominently in the Government's campaign plans and were generally predicted to be ballot-winning issues for the October 2004 federal election. The Government thus chose an aggressive response to the Brigitte incident. Rather than reviewing and addressing apparent administrative lapses, the Coalition's political rhetoric focussed heavily on the assertion that Brigitte's presence in Sydney had highlighted the threat of terrorism to *mainland* Australia. And, as a consequence, the introduction of even "tougher" anti-terrorism legislation was warranted.

Attorney-General Ruddock, in particular, sought to capitalise politically upon the Brigitte incident. Emphasising the effectiveness (sic) of Australia's co-operative counterterrorism arrangements with France, Ruddock went so far as to claim that the Brigitte case had shown that ASIO's powers were "clearly inadequate" and that Australia's anti-terrorism legislation ranked only "third and fourth best".[690] Without even attempting to apply ASIO's new questioning and detention powers to the Brigitte case, the Attorney-General called for further amendments to the ASIO Act.[691] A comparison with French anti-terrorism laws, Ruddock hinted, required Australia to introduce significant additional arrangements.[692] However, as Greg Carne has pointed out, comparing the ASIO Act with the French counterterrorism powers was not only inappropriate for inter-

[689] Ibid.
[690] Cynthia Banham, "ASIO laws inferior insists Ruddock," *Sydney Morning Herald* (Sydney), 4 November 2003.
[691] Channel Nine Interview with Philip Ruddock, 2 November 2003,
< http://sunday.ninemsn.com.au/sunday/political_transcripts/article_1434.asp?s=1>.
[692] ABC, Lateline, 27 October 2003. This comparison has also been used to explain the deportation of Brigitte on the grounds of the supposed inadequacy of the ASIO detention and questioning regime.

jurisdictional reasons, but also failed to acknowledge the systemic human rights abuses arising from those powers reported by the United Nations human rights treaty bodies, the European Court of Human Rights and Amnesty International.[693]

Seemingly unaffected by such criticisms the federal government moved quickly to expand the legislative counterterrorism framework and introduced into Parliament the *ASIO Legislation Amendment Bill 2003* (Cth) on 27 November 2003. The legislation passed the Senate just eight days later. In contrast to the ASIO Act amendments of 2002 (enacted in June 2003), the November 2003 additions were not subject to scrutiny by any parliamentary committee. Although the Greens and Democrats called for the Bill to be referred to the Senate Legal and Constitutional Committee, Labor, fearing once again to be seen as "soft" on terrorism, supported the Government's Bill unconditionally.

The Bill doubled the maximum time a person could be questioned under a warrant where an interpreter is needed from 24 to 48 hours. Despite strong criticism from a number of organisations, including the Australian Broadcasting Cooperation and the Australian Press Council, the legislative amendments also tightened secrecy provisions preventing people from discussing information obtained during their interrogation for two years after the warrant has expired.[694] These disclosure offences included unauthorised primary and secondary disclosures of an extensive range of information. The effect of these provisions criminalised media reporting of material within the broad terms of the prohibitions including reporting of the fact that a detention and questioning warrant has been issued in relation to a specific matter.

The Government's effort to turn the political negative of Brigitte's presence in Australia into a positive by claiming that recently enhanced ASIO powers were inadequate, was remarkable for several reasons. First, it confirmed an unapologetic shift to an overt, professionalised politicisation of counterterrorism issues, juggling partisan political advantage with the security of the nation.[695] Second, the Attorney-General's call for legislative reform a mere four months after the conclusion of sixteen months of exhaustive debate, and three parliamentary committee reports highly critical of the Government's proposals, was dismissive of the democratic contribution expended in that legislative process. Finally, the legislative response to the Brigitte incident included provisions that encroached upon fundamental freedoms such as the freedom of the press. It was difficult to see,

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[693] Greg Carne, "Brigitte and the French Connection: Security Carte Blanche or a la Carte?," *Deakin Law Review* 9, no. 2 (2004): 604-10.
[694] See, e.g., Australian Press Council, "News, February 2004," <http://www.presscouncil.org.au/pcsite/apcnews/feb04/news.html>.
[695] Carne, "Brigitte and the French Connection," 597-602.

however, how such amendments could have constituted an essential tool for effective counterterrorism policy. If anything, they reduced democratic accountability and diminished the vital safeguard of free press reporting, without decreasing the risk of a terrorist attack.

III. The Jack Roche Case

Jack Roche was born as Paul George Holland in the Yorkshire town of Hull in 1953 and moved to Australia in 1978.[696] After working in various general labouring occupations throughout the 1980s, he accepted a job at a Sydney factory which also employed several Indonesian Muslims. Through the contact with his Indonesian workmates, Roche eventually converted to Islam in 1992 while trying to combat a drinking problem. He then spent several years in Indonesia learning about Islam and teaching English as a second language. Upon his return to Australia in 1996, Roche came into contact with the Indonesian twin brothers Abdul Rahman and Abdul Rahim Ayub who were believed to have headed the Australian branch of the Indonesian Islamist group Jemaah Islamiah (JI).[697]

In February 2000, Abdul Rahim Ayub delegated Roche to fly to Malaysia to meet with Hambali, thought to have been the regional head of JI and the mastermind of the Bali bombings of October 2002. He encouraged Roche to travel to Afghanistan for basic military training. Roche agreed, and, a month later, flew to Karachi, Pakistan, where he met Khalid Sheikh Mohammed (Mukhtar), a senior al-Qaeda operative who is now in U.S. custody. Mukhtar asked Roche about Israeli and American interests in Australia and gave him a letter addressed to "the sheik". Roche subsequently embarked on his trip to Afghanistan and delivered Mukhtar's letter to Abu Hafs and Saif, allegedly two deputies of Osama bin Laden. While receiving two weeks' military training in an al-Qaeda camp near Kandahar, Roche also briefly met bin Laden in person and later described him as "really very nice".[698]

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[696] Unless referenced otherwise, the information on Roche provided in this chapter is based on the sentencing remarks by Justice Healy, District Court of Western Australia; Sentencing Remarks - IND 03/0622 - (R v. Roche); see *R v. Roche* [2005] WASCA 4.

[697] Abdul Rahman is a militant cleric and veteran of the "Islamic holy war in Afghanistan" and a graduate of the infamous Ngruki School founded by radical Muslim cleric and alleged JI spiritual leader Abu Bakar Bashir. ABC, Transcript TV Program, Four Corners, "The Australian Connections," 12 June 2003; <http://www.abc.net.au/4corners/content/2003/transcripts/s878332.htm>. Abdul Rahman applied for refugee status but lost his case in the Refugee Review Tribunal and was deported in 1999. Abdul Rahim left Australia for Indonesia in September 2002. Indonesia's national intelligence agency, BIN, located Abdul Rahim Ayub in West Java in early 2004. However, according to Indonesian officials neither Abdul Rahim, nor his twin brother Abdul Rahman, have been linked to any terrorist act in Indonesia or raised the interest of Indonesian counterterrorism police; See Martin Chulov, "Indonesian agents track down JI's Australian 'leader'", *The Australian* (Sydney), 16 July 2004.

[698] Roy Gibson, "Bin Laden very nice: Roche," *The West Australian* (Perth), 21 May 2004.

After the completion of his military training, Abu Hafs and Saif ordered Roche to conduct surveillance on Israeli and U.S. targets in Australia, and also to recruit other Australians to form a "cell". Roche returned to Perth in April 2000 and, according to his own account, was "full of fervour for the Islamic cause".[699] However, he then found out, through an internet search, that some of the people who had given him orders in Afghanistan were on the FBI's most wanted list. It was around this time that Roche apparently began to realise the enormity of what he had embarked upon. But since "you just don't walk away from these kinds of people," Roche, fearing for his life, continued to carry out his orders to investigate Israeli interests in Australia.[700]

Two months later, in June 2000, Roche travelled to Sydney and took still photos of the Israeli consulate. He then drove to Canberra and filmed the Israeli embassy. Instead of quietly video-taping the embassy compound, however, Roche wandered around behaving so conspicuously that an Australian Protective Services security guard walked up and had a conversation with him. A month later, he told Ibrahim Fraser, a friend and fellow Muslim-convert, that there were plans to bomb the Israeli embassy. After telling him about "25 times", according to Fraser's account, Fraser finally took Roche seriously and telephoned the Australian Federal Police (AFP). The AFP, however, ignored Fraser's call. On 14 July 2000, Roche contacted ASIO himself to report about his surveillance work, his trip to Afghanistan and the orders he had received from senior al-Qaeda operatives. The intelligence agency did not respond – a failure subsequently acknowledged by ASIO.[701]

In late July 2000, Roche travelled to Indonesia where he was told by Abu Bakar Bashir to comply with any order he was given by Hambali, "whatever it happens to be". Upon his return to Australia on 10 August 2000, Roche contacted ASIO again. Once more the intelligence agency did not reply. Roche then "thought just leave it" and decided to wait for "somebody to come knocking on my door."[702] Several weeks later, Bashir allegedly called Roche in Perth and told him to abandon any plans. Apparently there had been a fall-out between the Ayub brothers and Bashir over Hambali's interference in JI's affairs in Australia.

Two years later, shortly after the Bali bombings of October 2002, which killed 88 Australians, Roche was tracked down by a reporter from *The Australian* newspaper and subsequently gave a series of taped interviews. These interviews provided the basis for ASIO raids on his home in Perth

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[699] Ibid.
[700] "Australian suspect 'feared for life'", *BBC News Online*, 27 May 2004, <http://news.bbc.co.uk/2/hi/asia-pacific/3753627.stm>.
[701] ASIO, *Report to Parliament 2003-04*, 5, 26.
[702] "Roche 'lost interest' in bombing," *Sydney Morning Herald* (Sydney), 27 May 2004.

and later charges laid by the police. Roche subsequently cooperated fully with ASIO and the AFP and provided the full details of what he had been doing, his JI contacts in Indonesia and his Al Qaeda contacts in Afghanistan. It has been reported that this information contributed to the arrest of alleged Bali mastermind Hambali as well as to the capture of Khalid Sheikh Mohammed (Mukhtar). What is more, the information provided by Roche was instrumental in proving the Crown's case against him. According to AFP officer Michael Duthie, it was Roche's own interview with the AFP which provided the evidence which led to his conviction. By taking part in the interview, he put "a noose around his own neck."[703]

The trial of Jack Roche commenced on 17 May 2004. Initially pleading not guilty, Roche changed his mind during the proceedings and, on 28 May, admitted to the charge of conspiring to "commit an offence contrary to section 8(3C)9a) of the *Crimes (Internationally Protected Persons) Act 1976* (Cth) being to intentionally destroy or damage by means of explosive the official premises of internationally protected persons, namely, the Israeli Embassy, with intent to endanger the lives of internationally protected persons by that destruction or damage contrary to section 86(1) of the *Crimes Act 1914* (Cth)."[704] On 1 June 2004 he was subsequently sentenced to nine years imprisonment. Since Roche did not have a previous criminal record, he was declared eligible for parole after half of his sentence. According to Justice Healy, Western Australia's most experienced judge, his chances of re-offending were virtually non-existent.

Tabloid front pages and news reports were filled with fury at the Court's treatment of Australia's "first terrorist". Sydney's *Daily Telegraph*, for instance, carried the front page headline: "What a joke - free in three years."[705] "Soft on terror" the Melbourne *Herald Sun* screamed, equally infuriated, and *The Australian* criticised that Justice Healy had failed "to get with the [anti-terrorism] program."[706] Unsurprisingly, the media's outrage was mirrored by the reaction of the public at large. In an instant internet poll conducted on TV Channel Nine's website http://ninemsn.com.au, for instance, over two thirds of respondents thought the Roche sentence "too lenient."[707]

Politicians and police officials quickly joined in the chorus of critics and put forward their own personal suggestions on how the courts - purposely independent of government - should deal with

[703] Cameron Stewart, Paige Taylor, Belinda Hickman and John Kerin, "Terrorist tried to warn ASIO," *The Australian* (Sydney), 29 May 2004.
[704] It has been falsely reported that Roche was the first person convicted under Australia's "new" anti-terrorism laws; see e.g. "Australian jailed for embassy plot" *BBC News (Online)*, 1 June 2004; <http://news.bbc.co.uk/2/hi/asia-pacific/3765453.stm>;.
[705] "What a joke - free in three years," *Daily Telegraph* (Sydney), 2 June 2004.
[706] "Soft on terror," *Herald Sun* (Melbourne), 2 June 2004.
[707] Online-Poll, Channel Nine, http://ninemsn.com.au, on file with author.

the "terrorists". According to federal Liberal MP Peter Dutton, for instance, the Court should have "put in place proper deterrents for terrorists."[708] Similarly, the New South Wales Shadow Minister for Police, Peter Debnam, insisted that the judges needed to "get in step with community expectations and also what Parliament expects."[709] Some of these community expectations were more drastic than others. For John Harrison, who lost his daughter in the Bali bombings, even the 25-year maximum sentence initially requested by the Crown would have been too light. Although Roche was not charged for any involvement in the Bali atrocities, Harrison's demand was blunt and simple: "Hang the bastard!"[710]

The public outrage over the Court's sentence provided another convenient opportunity for the Howard government to divert attention from the fact that - analogous to the Brigitte affair - the Roche incident had revealed serious administrative failures on the part of ASIO and the AFP. ASIO's raids on Roche's Perth home in October 2002 and the charges subsequently laid by the police had only followed an independent investigation by a newspaper journalist. What is more, Roche had attempted to contact the intelligence agency repeatedly over several months in 2000. ASIO, however, did not return the calls and the Perth resident apparently did not spark any further interest from the government authorities until late 2002.[711]

Some commentators subsequently suggested that Roche's information on al-Qaeda and JI "might have" prevented the Bali bombings from occurring.[712] Clive Williams, a former intelligence official, pointed out, for example, that "[i]t would have perhaps been possible for us to have gained a much better understanding about what JI was all about, that it had operational plans, it did intend to conduct activities, because it then went on and perpetrated the December 2000 bombings [in Indonesia and the Philippines] and, of course, ultimately was responsible for the Bali operations. So had we known a bit more about JI and its linkages to al-Qaeda and what it was planning to do, maybe we could have put a bit more pressure on the Indonesians to put more effort into monitoring JI, which in turn might have more difficult for JI to actually conduct its operations."[713]

Whether and to what extent Roche's information on JI and al-Qaeda would have in fact enabled the Australian and Indonesian authorities to prevent the Bali attack, remains subject to speculation. It is

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[708] "DPP may appeal Roche sentence: Ruddock," *Sydney Morning Herald* (Sydney), 2 June 2004.
[709] "Ruddock flags national no-bail laws for terror suspects," *ABC News (Online)*, 3 June 2004, <http://www.abc.net.au/news/newsitems/s1122028.htm>.
[710] Christopher Michaelsen, "A disturbing descent into paranoia," *Canberra Times* (Canberra), 10 June 2004.
[711] ASIO itself acknowledged the failure to follow up public line calls by Jack Roche in mid–2000; see ASIO, *Report to Parliament 2003-04*, 5.
[712] ABC Radio, Transcript, PM Program, "Does Roche's profile fit that of a terrorist?", 28 May 2004, <http://www.abc.net.au/pm/content/2004/s1118493.htm>.
[713] Ibid.

patently obvious, however, that any ASIO blunders remotely connected to the bombings that killed 88 Australians about 18 months earlier carried significant potential for an electoral backlash. At the time of the Roche trial, the Australian federal elections were just three months away and the Government already had been under political pressure for a number of reasons. First, the Opposition was calling for an inquiry by a Royal Commission into the intelligence agencies' apparent failures in the lead-up to the Iraq war of 2003. Second, tough questions were being asked about the Government's knowledge of, and the Australian military's involvement in the Abu Graib prison scandal. Finally, despite the Government's domestic counterterrorism and emergency response efforts, a review conducted by Australian emergency response personnel and several US officials involved in the September 11 recovery operations found that Australia still lacked a 9/11 rescue capability.[714] The review's publication coincided with the opening day of the Roche trial.

The Government thus decided to go on the offensive. Its response was in many ways similar to the one in the Brigitte affair. Declaring that any inquiry into potential ASIO failures would be "indulgent" and "disruptive", the Attorney-General announced that he had instructed the Commonwealth (federal) Director of Public Prosecutions (DPP) to consider appealing against the Roche sentence for being "too lenient."[715] The next day, however, Ruddock admitted under questioning in Parliament that the federal DPP had sent a letter to Justice Healy at the District Court of Western Australia acknowledging Roche had cooperated with the authorities and therefore deserved a more lenient sentence than the 25-year maximum the Crown would ask for in open court.[716] Incidentally, the DPP's appeal was rejected by the Western Australian Court of Criminal Appeal and Roche's sentence upheld on 14 January 2005.[717]

In addition, the Attorney-General announced further changes to the federal anti-terrorism laws. In particular, he indicated that the Government was looking at immediately introducing new legislation that would set a non-parole period for persons convicted of "terrorist" offences. And indeed, on 30 June 2004, Parliament passed the *Anti-Terrorism Act 2004* (Cth). The Act provided for minimum non-parole periods for persons convicted of, and sentenced for, committing terrorism offences and certain other offences that are relevant to terrorist activity.

The *Anti-Terrorism Act 2004* also amended the *Proceeds of Crime Act 2002* (Cth). Under the new arrangements the Commonwealth is entitled to seek a restraining order "if there are reasonable

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[714] "Australia lacks 9/11 rescue capability," *Australian Associate Press*, 18 May 2004.
[715] Cynthia Banham, "Courts too 'lenient' on terrorists," *Sydney Morning Herald* (Sydney), 3 June 2004.
[716] ABC Radio, Transcript AM Program, "DPP appeals against the sentence of Jack Roche," 28 May 2004, <http://www.abc.net.au/am/content/2004/s1130575.htm>.
[717] "Jack Roche's nine-year sentence upheld," *Sydney Morning Herald* (Sydney), 14 June 2005.

grounds to suspect (sic) that a person has committed an indictable offence or a foreign indictable offence, and that the person has derived literary proceeds in relation to the offence."[718] In effect, this provision enabled the Government to prevent persons from making money by selling books or memoirs about training and contact with banned organisations. As the amendment operated retrospectively, it applied not only to the Roche case but also to the two Australian Guantanamo Bay detainees, David Hicks and Mamdouh Habib. Indeed, when Mamdouh Habib returned to Australia from Guantanamo Bay in late January 2005 (without conviction or charge), Attorney-General Ruddock indicated that he was looking into trying to prevent Habib from selling his story to Australian television. However, no application for a restraining order was made. [719]

The Jack Roche case is another remarkable example of the Howard government's ability to instrumentalise public sentiment in order to divert attention from serious administrative inadequacies in handling public line calls on the part of ASIO. It is self-evident that these inadequacies carried considerable potential for embarrassment for the Government, with possible adverse effects on the outcome of the federal elections just three months later: the Coalition had heavily invested in its election campaign on "national security" which included the establishment of a "national security hotline," guidance on "how to spot a terrorist" and freely dispatched (to every household) fridge-magnets advising Australians to be "alert but not alarmed."[720] The Government thus chose an aggressive response to the Roche case that appears to have been primarily motivated by a desire to maintain an image of being "tough on terrorism". In effect, however, the measures introduced constituted a disturbing interference in the administration of justice and the courts' discretion to set parole. What is more, they unduly encroached upon the freedom of speech in an apparent attempt to silence "alleged terrorists" from telling their part of the story. Again it is difficult to see how such legislative measures contributed to decreasing the risk of terrorist attacks.

IV. The Bilal Khazal Bail Hearing

Born in northern Lebanon in 1970, Bilal Khazal came to Australia as a three-year-old child. After living in Australia for several years, he moved back to Lebanon to spend time with his relatives. In 1989, Khazal returned to Australia settling in the outskirts of Lakemba, in Sydney's south-west, with his wife and two children. He found employment at Sydney airport and worked as a Qantas baggage handler for twelve years. In 2000, health problems forced Khazal to quit his job and he was

[718] *Proceeds of Crime Act 2002* (Cth), s 20(1)(d).
[719] Christopher Michaelsen, "Why everybody should hear Habib's story," *Canberra Times* (Canberra), 3 February 2005.
[720] Kerrie-Anne Walsh, "Be calm, but here's your 'terrorist kit'," *Sydney Morning Herald* (Sydney), 2 February 2003.

given compensation and a payout.[721] While undertaking occupational retraining he intensified his involvement with the Islamic Youth Movement in Lakemba, which, among other activities, raised funds for relief projects in Islamic countries. Khazal edited the Movement's magazine, Nida'ul Islam or Call of Islam, and also oversaw the administration of its website. Through this outlet he seems to have attracted attention, both from sympathisers and ASIO.

Khazal appears to have been known to ASIO for his extremist and Islamic fundamentalist views for more than ten years. According to ASIO documents reportedly sighted by ABC Radio correspondent Michael Vincent, Khazal came to the agency's attention after being stabbed in an apparent faction fight in Lakemba's Islamic community in 1994. Over the next decade, ASIO apparently interviewed Khazal at least a dozen times.[722] At first he was reported to be quite forthcoming, telling intelligence officers they could contact him any time.[723] Following 9/11, however, the relationship between ASIO and Khazal worsened. Khazal described Osama bin Laden as a "good man" and allegedly told ASIO agents that "civilians should not have been targeted but targeting US military would be all right."[724] ASIO then intensified his surveillance and informed Khazal that "he and people like him were now being monitored very closely."[725]

In February 2002, Khazal booked a flight to Saudi Arabia in order to participate in the pilgrimage to Mecca. Australian authorities, however, prevented him from leaving the country and his passport was cancelled.[726] Four months later, in June 2002, the CIA issued a report claiming that Khazal was "reportedly planning an explosives attack against some US embassies," including one in Venezuela, as well as against US interests in the Philippines.[727] Khazal, however, proclaimed his innocence and pointed out that the authorities had obviously targeted the wrong person because his middle name was wrongly given as "Abdallah".[728] No charges were laid against him in response to the allegations raised in the leaked CIA document.

Nonetheless, Khazal appears to have had a penchant for attracting trouble. In late 2003, he and his brother, Maher, were sentenced in absentia by a Lebanese military tribunal for donating money to

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[721] "The baggage of Bilal Khazal," *Sydney Morning Herald* (Sydney), 4 June 2004.
[722] ABC Radio, Transcript, PM Program, *ASIO had long-standing relationship with terror suspect*, 2 June 2004, <http://www.abc.net.au/pm/content/2004/s1121635.htm>.
[723] At one stage Khazal agreed to ASIO taking his computer away. But when it came back from ASIO, the screen did not work. As an apparent act of goodwill, ASIO decided to buy him a new one. "The baggage of Bilal Khazal." *Sydney Morning Herald*, 4 June 2004.
[724] Ellen Connolly, Les Kennedy and Cynthia Banham, "Fury at terror suspect's bail," *Sydney Morning Herald* (Sydney), 3 June 2004.
[725] "The baggage of Bilal Khazal".
[726] ABC Radio National, Transcript PM Programme, *ASIO had long-standing relationship with terror suspect*, 2 June 2004; <http://www.abc.net.au/pm/content/2004/s1121635.htm>.
[727] David Adams, "CIA report unmasks Australian 'terror boss'", *The Age* (Melbourne), 10 June 2004.
[728] Graeme Webber, "Ex-Qantas man denies terror link," *Herald Sun* (Melbourne), 4 June 2004.

an Islamic group which orchestrated a string of bomb attacks in Lebanon. The Lebanon trial heard allegations that Khazal became friends with the leader of Khaliyat Trablus (The Cell of Tripoli), Mohammed Kaaka, in the late 1990s. Both Maher and Bilal Khazal have vigorously protested their innocence. Their lawyer in the matter, Adam Houda, pointed to statements from Mohammed Kaaka - corroborated by his mother - that the money had been for Lebanese charities.[729] Although Australia introduced laws allowing his extradition to Lebanon, no extradition request were ever made.

Then, on 2 June 2004, Khazal was arrested and charged with "collecting or making documents likely to facilitate terrorist acts," an offence that carries a maximum of 15 years imprisonment. The arrest apparently stemmed from information obtained by ASIO staff while inspecting his computer's hard-drive under a search warrant on 6 May 2004. This information allegedly linked Khazal to a document posted on the internet from 26 September 2003 to 10 May 2004. The document, entitled *Provision in the Rules of Jihad-Short: Wise Rules and Organisational Structures that Concern every Fighter and Mujahid Fighting against the Infidels*, was written in Arabic and espoused radical views on violent action against so-called "infidels". Nonetheless, the electronic pamphlet was very general. It did not urge any particular action to be taken by any particular person at any particular time or at any particular place. And while some of its sections appear to have been written by Khazal personally, many paragraphs were "cut and pasted" from other publicly available internet documents. When police brought the posting to Khazal's attention in late May 2004, he removed it from the internet immediately.

Khazal appeared before Local Court Central in Sydney on the afternoon of 2 June 2004 and applied for bail. While the Crown argued that it was "inappropriate" to grant bail given the "seriousness of the offence" and his "overseas links", Khazal's counsel, Chris Murphy, maintained that the arrest was conveniently timed for political purposes, coinciding with Prime Minister Howard's departure to the US to see "Mr Bush pat him on the head.".[730] Accusing the Government of conducting a "one terrorist-a-week arrest program" in the lead-up to the federal election (of October 2004), Murphy claimed the case was all about "bash a Muslim, buy a vote,"[731] Given that Khazal's passport had been withdrawn in 2002, the defence counsel also argued that his client did not pose any flight risk. Magistrate Les Brennan agreed with Murphy and held that while the Crown's case appeared strong, it had failed to convince him to overturn the (then) existing presumption in favour of bail.

[729] "The baggage of Bilal Khazal".
[730] Connolly, Kennedy and Banham, "Fury at terror suspect's bail."
[731] ABC, Transcript TV Program, 7.30 Report, "Khazal bail sparks law debate," 3 June 2004; <http://www.abc.net.au/7.30/content/2004/s1124145.htm>.

Consequently, the judge set bail at A$ 10.000 and imposed the additional condition that Khazal report to a nearby police station daily. The Crown did not oppose.

As with the response to the Roche judgment the day before, the Magistrate's decision was followed by outrage on both sides of politics. In New South Wales (NSW), Labor Premier Bob Carr called on the Commonwealth Director of Public Prosecutions (DPP) to lodge an appeal against the bail decision immediately as the latter clearly was "an example of a court failing to acknowledge that [it is] dealing with a new type of threat and a new type of offence"[732] The Premier's fury was matched by similar comments from other prominent NSW politicians and officials. For Police Minister John Watkins the bail decision was simply 'inexplicable'.[733] Police Commissioner Ken Moroney too was "honestly astounded" and criticised the Magistrate's ruling as "inadequate on this occasion,"[734] And Shadow Police Minister Peter Debnam claimed that he was totally "dumbfounded" by the decision. He subsequently called on the "judges and magistrates" to "get real."[735]

The next day, the NSW Parliament amended the *Bail Act 1978* (NSW), (which applies to Commonwealth and State offences, both of which are prosecuted before State courts), bringing all federal "terrorism-related offences" into the category of offences for which there is a presumption *against* bail.[736] The new legislation was also specifically allowed to operate retrospectively and thus applied to offences committed or bail decisions made before the commencement of the new Act. As a consequence, the new arrangements also applied retrospectively to the Khazal bail decision of 2 June.

Unsurprisingly the amendments were heavily criticised by several leading members of the legal profession, not only because they were rushed through Parliament without adequate deliberation, but also because they further diluted one of the fundamental principles of criminal justice: the presumption of innocence. The President of the Australian Bar Association, Ian Harrison, took "exception to the furore at a political level. It itself strikes at the administration of justice."[737] Harrison stated that he was "not in favour of political reactions to the judicial process; the judicial process is well founded historically. It is supported by appropriate legislation and the application of

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[732] "Khazal's Bail Must Be Appealed," *Sydney Morning Herald* (Sydney), 3 June 2004.
[733] "Minister critical of bail for terror suspect," *ABC News (Online)*, 3 June 2004, <http://www.abc.net.au/news/newsitems/s1121797.htm>.
[734] ABC Radio, Transcript PM Program, *DPP to appeal Khazal bail*, 3 June 2004, <http://www.abc.net.au/pm/content/2004/s1124078.htm>.
[735] "Ruddock flags national no-bail laws for terror suspects," *ABC News (Online)*, 3 June 2004; <http://www.abc.net.au/news/newsitems/200406/s1122028.htm>.
[736] The presumption against bail places the burden on the applicant (rather than the Crown) to show that bail should not be refused alongside other serious offences involving drugs, weapons and violence.
[737] ABC, Transcript TV Program, 7.30 Report, 3 June 2004.

those laws is a matter for the courts.[738] Dismissing these criticisms as baseless, NSW Attorney-General Bob Debus, on the other hand, claimed that it was justified "bringing the section dealing with bail forward today."[739] Moreover, it was "necessary to give the public reassurance in the light of events in the last 24 hours."[740]

Equipped with the new bail legislation, the Commonwealth DPP then launched an appeal against the Magistrate's bail decision and the matter was referred to the NSW Supreme Court. Much to the federal and state government's disappointment, however, Supreme Court Justice Greg James formally dismissed the appeal on 24 June. In continuing the bail, Justice Greg James imposed stricter reporting and monitoring conditions on Khazal and increased the surety on his bail. Nonetheless, he found that the Lakemba resident "posed no threat to the community" and that his actions in relation to the compilation of the internet pamphlet did not constitute an offence "of the greatest seriousness,"[741]

A few hours after the Commonwealth had lost its appeal, the federal Attorney General subsequently blamed the NSW Government for failing to enact adequate bail laws. "If New South Wales had adopted the same standard that we are proposing," Ruddock speculated, "the case may have been dealt with differently."[742] The federal government's standard Ruddock was referring to was enacted six days later as part of the *Anti-Terrorism Act 2004* (Cth). It provided that "despite any other law of the Commonwealth, a bail authority must not grant bail to a person (the defendant) charged with, or convicted of, an offence covered by subsection (2) (terrorism-related offences) unless the bail authority is satisfied that exceptional circumstances exist to justify bail."[743] Although the wording of this provision is undoubtedly stronger than the "presumption against bail" terminology of the NSW legislation, both arrangements have the same effect in practice.

The political and legislative response to the Khazal bail decision constituted an another example on the part of the executive to play politics with issues related to "terrorism" and "national security". Both the federal government in Canberra and the State government in NSW sought to capitalise politically on an incident, which had few, if any, important implications for the security of the nation, but potentially adverse effects on the way the major political actors were perceived by the

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[738] Ibid. Harrison's remarks were mirrored by those of Pauline Wright, Chairperson of the NSW Law Society's Criminal Law Committee and John North, President of the Law Council of Australia, ABC Radio, Transcript AM Program, *Ruddock criticises NSW bail laws*, 25 June 2004, <http://www.abc.net.au/am/content/2004/s1140214.htm>.
[739] Brendan Nicholson, "Moves to alter law after suspect wins bail," *The Age* (Melbourne), 4 June 2004.
[740] Ibid.
[741] *R v Khazal* [2004] NSWSC 548; see also "Khazal free on strict bail conditions," *Sydney Morning Herald* (Sydney), 25 June 2004.
[742] ABC Radio, Transcript AM Program, *Ruddock criticises NSW bail laws*, 25 June 2004.
[743] *Crimes Act 1914* (Cth), (new) section 15AA(1).

electorate in relation to the politics of national security. Some commentators went so far as to claim that the Khazal arrest itself was motivated purely by political reasons, particularly given that the Lakemba resident had been on ASIO's watch-list for over ten years, and also in light of the fact that the electronic pamphlet that provided the basis for his charge had been removed from the internet four weeks earlier. While the timing of Khazal's arrest was dubious indeed, the case is also remarkable for the legislative action that followed at both the State and federal levels. The NSW Government's unabashed admission of its intentions in amending the bail laws, for instance, is disturbing in particular. Similar to the Howard government's response to the Roche sentence, the immediate amendment of the NSW and Commonwealth bail legislation showed blatant disrespect for the judicial system, its impartiality and fairness, and undermined the principles of due process in the criminal justice system. Whether and to what extent the amendments were of any real value for effective counter-terrorism law and policy, however, remained open to question at best.

V. The Aftermath of the 7/7 London Bombings

The London bombings of 7 July 2005 and the controversial debate about the adequacy of existing anti-terrorism legislation in the United Kingdom throughout 2005 were closely observed by the Howard government in Canberra. And it was felt that in Australia, too, there was a need to further strengthen and expand the already comprehensive legal counter-terrorism framework. Attorney-General Ruddock, for instance, argued that in light of the London bombings it was of the utmost importance to "undertake a thorough review of all of the measures that have been implemented abroad and to see whether any of them were measures that we could usefully add to our armoury here (...)."[744] What the Attorney-General (or any other Government representative) did not explain, however, was how exactly the bombings in London had changed the level or nature of threat of terrorism in Australia, or whether indeed there was any evidence to suggest that the security situation in Australia was comparable to the United Kingdom's.

While the London bombings featured prominently in the Australian news media, two other issues dominated domestic politics in the latter half of 2005: the privatisation of the Commonwealth controlled communications corporation Telstra and "WorkChoices", a comprehensive change to industrial relations in Australia. The sale of the Commonwealth's majority of equity in Telstra as well as the WorkChoices proposals encountered significant opposition among the Australian public and even within the ranks of the Coalition. In order to placate his National Party allies who faced a

[744] ABC, Transcript TV Program, Insiders, "Counter-terrorism laws a balancing exercise: Ruddock," 11 September 2005; <http://www.abc.net.au/insiders/content/2005/s1457695.htm>.

backlash in their electorates, for instance, Prime Minister Howard was forced to agree to a $3.1 billion dollar package to improve rural telecommunication services.[745] The Telstra Bill subsequently passed the House of Representatives on 7 September 2005, where the Government commanded a large majority. It cleared the Senate by only one vote a day later.[746] The Government's WorkChoices package faced similar opposition. Earlier in the year, the Australian Council of Trade Unions (ACTU), the peak association for Australian trade unions, had launched its "Your Rights at Work" campaign opposing the proposed changes. The campaign involved mass rallies and marches, television and radio advertisements, judicial action, and e-activism. It triggered a massive Government counter-campaign promoting the reforms which, by September 2005, had cost approximately $46 million.[747] The Government's campaign spending was also the subject of an unsuccessful High Court challenge.[748]

A renewed focus on "terrorism" and "national security" provided an opportunity for the Government to divert public attention from the unpopular WorkChoices package and the Telstra sale. On 8 September 2005, the day the Telstra passed the Senate, the Prime Minister announced his government's intention to introduce additional anti-terrorism measures and released details of the proposals for new legislation in anticipation of a meeting of the Council of Australian Governments (COAG) later that month.[749] At the meeting of State and Territory Premiers and Chief Ministers with the Prime Minister, held on 27 September 2005, the participants adopted a communiqué setting out their consensus on a number of issues relating to efforts to combat terrorism. The meeting included a briefing by the Directors-General of the Office of National Assessments and the Australian Security Intelligence Organisation, which appears to have had a persuasive effect on the leaders. The State and Territory leaders agreed to a number of proposals to strengthen existing counter-terrorism laws, including the introduction of control orders, as well as a system of preventative detention.[750] Such agreement was required for constitutional reasons as it was necessary for the States to enact complementary legislation. It was also necessary for the

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[745] ABC, Transcript TV Program Lateline, "Government wins backbench support for Telstra privatisation," 17 August 2005, <http://www.abc.net.au/lateline/content/2005/s1440180.htm>.

[746] Senate Standing Committee on Environment, Communications and the Arts. *Telstra (Transition to Full Private ownership) Bill 2005 and related bills*. 12 September 2005;
<http://www.aph.gov.au/Senate/committee/ecita_ctte/completed_inquiries/2004-07/sale_telstra/report/c01.pdf>.

[747] Ron Peake, "Howard admits IR ads may cost $40m," *Canberra Times* (Canberra), 22 October 2005. Government polling of the period August 2005 - February 2006, not released until March 2008, revealed that the government's advertising campaign failed to make workers less apprehensive about WorkChoices, see Mark Davis, "Howard ignored his own polling," *Sydney Morning Herald* (Sydney), 7 March 2008.

[748] With support from the ALP, the ACTU sought a court injunction and a High Court ruling concerning the WorkChoices campaign. The majority of the High Court (5-2) ruled in that the monies spent on the WorkChoices campaign were sufficiently appropriated by the Appropriation legislation. Accordingly, the expenditure was found to be constitutional and not an unlawful use of taxpayers' money. *Combet v the Commonwealth* [2005] HCA 61.

[749] The Hon John Howard MP, "Counter-Terrorism Laws Strengthened," Media Release, 8 September 2005.

[750] Council of Australian Governments', Communiqué, Special Meeting on Counter-Terrorism, 27 September 2005, <http://www.coag.gov.au/meetings/270905/coag270905.pdf>.

Commonwealth to secure the consent of at least four States, and the majority of all States and Territories, to amend provisions of the *Criminal Code Act 1995* (Cth) relating to terrorism that relied in part upon a referral of powers from the States.[751]

Although the State and Territory leaders were all publicly in agreement with each other at the conclusion of the COAG meeting, it seems that the hothouse environment in which it was held may have pressured some Premiers and Chief Ministers into agreeing to broad-brush proposals to which they might not have consented if they had had further time to consider the issues. Some State and Territory leaders subsequently appeared discomfited when the federal government, in early October 2005, provided them with the draft federal legislation which it claimed was giving effect to the COAG agreement.[752] This draft legalisation was given to State and Territory leaders on a confidential basis – arguably to minimise public scrutiny.[753] However, the attempt to gag public debate was frustrated by the ACT Chief Minister, Jon Stanhope. Releasing the draft Bill on his website on 14 October 2005, Stanhope took the view that it was important for there to be adequate public scrutiny of the Bill.[754] He also commissioned legal opinions that questioned the consistency of the proposed Bill with Australia's international human rights obligations and with the provisions of the *ACT Human Rights Act 2004*.[755]

Stanhope's decision to release the draft bill was met with staunch criticism from the federal government. After attempts by the federal Attorney-General's Department to get the draft Bill removed from the Chief Minister's website had failed, a furious Prime Minister accused Stanhope of being "irresponsible".[756] Similarly, a spokeswoman for federal Attorney-General Phillip Ruddock found the publication of the draft legislation "disappointing" and claimed that the document had been provided to State and Territory leaders in "good faith".[757] Several civil society groups, on the other hand, welcomed Stanhope's move. Some of them subsequently undertook a detailed comparison of the initial COAG agreement and the draft anti-terrorism legislation as posted on ACT Chief Minister's website and found "serious discrepancies" between the two documents.[758]

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[751] *Criminal Code Act 1995* (Cth) div 100.8.
[752] "Stanhope questions 'hasty' terror laws," *The Age* (Melbourne), 17 October 2005.
[753] Andrew Byrnes and Gabrielle McKinnon, "The ACT Human Rights Act 2004 and the Commonwealth Anti-Terrorism Act (No 2) 2005: A Triumph for Federalism or a Federal Triumph?," in Miriam Gani and Penelope Mathew (eds.), *Fresh Perspectives on the 'War on Terror'* (Canberra: ANU e-Press, 2008): 361.
[754] Ibid.
[755] Andrew Byrnes, Hillary Charlesworth and Gabrielle McKinnon, "Human Rights Implications of the Anti-Terrorism Bill 2005," 18 October 2005, <http://acthra.anu.edu.au/media/Advice%2018%20oct.pdf>.
[756] "Howard on Attack Over Draft Bill Release," *Sydney Morning Herald* (Sydney), 15 October 2005.
[757] "Stanhope under fire over bill leak," *ABC News (Online)*, 15 October 2005; <http://www.abc.net.au/news/newsitems/200510/s1483113.htm>.
[758] Australian Lawyers for Human Rights, Australian Muslim Civil Liberties Advocacy Network, Combined Community Legal Centre Group (NSW), Civil Rights Network Federation of Community Legal Centres (Victoria), Liberty Victoria, National Association of Community Legal Centres, New South Wales Council for Civil Liberties, Public Interest

In particular, the comparison revealed that the draft legislation departed from the COAG Agreement in three important respects: an envisaged 10-year sunset clause provisions did not apply to all of the new measures, no provision was made for a review of the new measures five years after their enactment, and the normal avenues of judicial review were not available to key parts of the legislation including the provisions dealing with control orders and preventative detention orders.[759]

1. The Anti-Terrorism Act [No. 1] 2005 (Cth)

The ACT Chief Minister's decision to leak the draft legislation as well as the discrepancies between the draft legislation and COAG agreement added to the political pressure the Government was already facing due to its controversial Telstra sale and the ongoing debate on WorkChoices. And with public unease over the handling draft anti-terrorism legislation mounting, the Howard government decided once more to go on the offensive. On Tuesday, 2 November 2005, the Prime Minister issued a press release announcing that *specific* intelligence and police information about a *potential* terrorist threat required the anti-terrorism legislation to be introduced in the Parliament immediately. He declared that:

> Today the Government will introduce into the House of Representatives an urgent amendment to Australia's counter-terrorism legislation and seek the passage of the amendment through all stages tonight. The President of the Senate will recall the Senate for 2pm tomorrow. It is the Government's wish that the amendment be law as soon as possible.
>
> The Government has received specific intelligence and police information this week which gives cause for serious concern about a potential terrorist threat. The detail of this intelligence has been provided to the Leader of the Opposition and the Shadow Minister for Homeland Security.
>
> The Government is satisfied on the advice provided to it that the immediate passage of this bill would strengthen the capacity of law enforcement agencies to effectively respond to this threat.
>
> The Government is acting against the background of the assessment of intelligence agencies that a terrorist attack in Australia is feasible and could well occur. In ASIO's recently released annual report a warning is contained that specifically cites the threat of home-grown terrorism. ASIO also warned that attacks without warning are feasible.

Advocacy Centre, "Serious discrepancies between COAG agreement and draft anti-terrorism legislation," Letter to ACT Chief Minister Jon Stanhope, 19 October 2005, <http://www.alhr.asn.au/getfile.php?id=38>.

[759] Ibid.

> The substance of these amendments is currently part of the draft Anti-Terrorism Bill which has been circulated to the States and is being presented as a stand-alone bill. The effect of the amendment is to give relevant agencies a greater capacity to respond promptly whenever threats arise.
>
> The Government would like all elements of the Anti-Terrorism Bill, when introduced, to become law before Christmas. However, for the reasons I have outlined, these specific elements have taken on a greater degree of urgency and on that basis the Government intends to secure their passage immediately. ...[760]

The Prime Minister's alarming press release was issued on the very same day on which Australia's richest horse race, the Melbourne Cup, was run. As Andrew Lynch has noted, the significance of the Cup to national life in Australia is summed up in the cliché that it is "the race that stops the nation".[761] Taking advantage of a heightened level of distraction throughout the Australian community, the Government proceeded with introducing and passing the *Anti-Terrorism Bill [No.1] 2005* (Cth) into the House of Representatives. In spite of the apparent terrorism emergency, the Government's legislative activity, however, was not limited to introducing "urgent" changes to the legal counter-terrorism framework. The Government also introduced the *Workplace Relations Amendment Bill 2005* (Cth).With the Melbourne Cup and the Prime Minister's terror warning dominating the news, the introduction of the controversial WorkChoices legislation received little public and media attention.

In addition to introducing the *Anti-Terrorism Bill [No.1] 2005* (Cth) into the House of Representatives, the Government decided to recall the Senate for an emergency session to be held on 3 September 2005 – an event which according to the Leader of the Opposition in the Senate had occurred only three times previously in the history of the Parliament.[762] The recall of the Senate was all the more significant in light of the fact that it was scheduled to sit just five days later on Monday 7 November 2005.[763] In the Coalition-controlled upper house, the Bill encountered little opposition. Only the Greens and the Australian Democrats voted against the Bill claiming that by recalling the Senate the Government had pulled yet another a stunt to heighten Australians' fear of a terrorist attack.[764]. Labor, on the other hand supported the Government's Bill unconditionally. Labor Senate leader Chris Evans signalled the ALP's "good faith" support noting however that Labor "understood" the cynicism within the community because of the Government's record of

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[760] The Hon. John Howard MP, "Anti-Terrorism Bill," Media Release, 2 November 2005.
[761] Andrew Lynch, "Legislating with Urgency – The Enactment of the *Anti-Terrorism Act [No. 1] 2005*," *Melbourne University Law Review* 30, no. 3 (2006): 747-781. The Melbourne Cup day is an official public holiday in the state of Victoria.
[762] Commonwealth of Australia, *Parliamentary Debates*, *Senate*, 3 November 2005, 13 (Chris Evans).
[763] Parliament of Australia, Scheduled Sittings for 2005 (2004) <http://www.aph.gov.au/house/info/sittings/rsp05tab.htm>.
[764] Brendan Nicholson and Ian Munro, "Do not expect arrests yet, says PM," *The Age* (Melbourne) 4 November 2005.

politicising national security matters.[765] The Senate on 3 November adopted the Bill which commenced operation on 4 November 2005.

The *Anti-Terrorism Act [No.1] 2005* (Cth) as enacted by Parliament did not contain any of the controversial proposals that were subject of the COAG agreement of 27 September 2005 (and the draft legislation leaked by ACT Chief Minister Stanhope on 14 October 2005). Instead the Act clarified that, in the prosecution of existing terrorism-related offences, it was no longer necessary to identify a particular terrorist act. Hence the Act stipulated that it was now enough for the prosecution to prove that the particular conduct was related to "a" terrorist act (in contrast to "the" terrorist act as stipulated by existing legislation).[766] This change meant that a person could be prosecuted for terrorism offences even if they had not formed an intention to carry out a particular terrorist act. In effect, the thus further broadened the scope and application of the already exceptionally broad provisions enacted by *Security Legislation Amendment (Terrorism) Act 2002* (Cth) which had added a raft of new terrorism offences to the *Criminal Code Act 1995* (Cth).[767]

But what prompted the Prime Minister's terror alarm and set the extraordinary parliamentary legislative process in motion in the first place? In his press release of 2 November 2005, Howard only indicated that *specific* intelligence and police information about a *potential* terrorist threat required urgent changes to Australia's anti-terrorism legislation.[768] Indeed, on 3 September 2005, he further noted that "Australians should not expect arrests within days just because urgent terror legislation was enacted by Parliament."[769] Several media outlets, however, provided further information as to the possible reason the legislative amendments were being rushed through. *The Australian*, for instance, reported on the morning of 3 November 2005 that the laws were a response to "fears terrorists are moving closer to an attack on Sydney and Melbourne" and claimed to have learnt that the intelligence received by the Government related to "home-grown terror suspects" in those cities.[770] Similarly, the *Herald Sun* described the threat as "immediate and unspecified" and emanating from "an Islamic extremist group centred on Sydney."[771] Although these details were likely to be embellishments which journalists made upon the information officially available, Australian Democrats Senator Andrew Bartlett and Green Senator Bob Brown were both explicit in suggesting that the Government was engaged in leaking security information to the Murdoch-

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[765] Ibid.
[766] For a detailed discussion see Lynch, "Legislating with Urgency," 747-81.
[767] See the discussion in Chapter 5 above.
[768] The Hon. John Howard MP, "Anti-Terrorism Bill," Media Release, 2 November 2005; [emphasis added].
[769] Brendan Nicholson and Ian Munro, "Do not expect arrests yet, says PM," *The Age* (Melbourne), 4 November 2005.
[770] Patrick Walters and Steve Lewis, "Cities on Terror Alert," *The Australian* (Sydney), 3 November 2005.
[771] Ian McPhedran, Nick Butterly and Michael Harvey, "Terrorists planning attack, PM warns stop evil plot," *Herald Sun* (Melbourne), 3 November 2005.

controlled press while withholding the same from Parliament.[772] The Government strongly rejected this allegation.[773]

Then, on 8 November 2005, a high-profile counter-terrorism operation involving hundreds of police backed by helicopters took place in Sydney and Melbourne. Seventeen people were arrested in pre-dawn raids, including the alleged ring-leader and Melbourne-based Islamic preacher Abdul Nacer Benbrika. While the suspects in Sydney and Melbourne were still being interrogated, New South Wales Police Commissioner, Ken Moroney, and his Victorian counterpart, Chief Commissioner Christine Nixon, began a saturation media campaign hitting all the TV and radio breakfast programs.[774] Their words were as well co-ordinated as the raids: Australia had been saved from an "imminent" terrorist attack with the raids disrupting "final stages of a large-scale terrorist attack."[775] However, both Police Commissioners had to admit subsequently that there was no evidence to suggest that the arrested men had even selected a target for attack Moroney, for instance, acknowledged that "the exact target is unknown at this stage."[776] Similarly, Nixon conceded "that this group had no specific target in mind" and noted "that no evidence regarding this group relates at all to a threat to the Commonwealth Games."[777]

It became soon clear that the suspects were not 9/11 type terrorists planning their conspiracy in secret, under the police radar. On the contrary, the arrested men were some of the most investigated suspects in Australian police history and had been under constant surveillance for 18 months.[778] Since July 2004, the police and ASIO had compiled 16,400 hours of recordings from bugs and 98,000 telephone intercepts.[779] On top of that were reports and video footage from physical surveillance carried out by teams of undercover watchers; Victoria Police and the AFP had clocked up 402 eight-hour surveillance shifts, with an additional 224 shifts conducted by ASIO.[780] Abdul Nacer Benbrika, the alleged leader of the group and a father of six children, had his passport cancelled by the federal government in March 2003. A few months later, in June 2005, ASIO swooped on the suspects in Sydney and Melbourne, hauling most of the men in for questioning. Police had also seized $19,000 raised by Benbrika's group. In August 2005 Benbrika appeared on

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[772] Commonwealth of Australia, *Parliamentary Debates*, *Senate*, 3 November 2005, 26-7 (Andrew Bartlett), 47 (Bob Brown).
[773] Ibid, 45, 47 (Chris Ellison).
[774] Marian Wilkinson and Matthew Moore, "Patient hunters wait to spring the trap," *Sydney Morning Herald* (Sydney), 12 November 2005.
[775] Ian Munro, John Silvester and Tom Allard, "'We have disrupted a large-scale attack'," *The Age* (Melbourne), 9 November 2005.
[776] Ibid.
[777] Ibid.
[778] Marian Wilkinson and Matthew Moore, "Patient hunters wait to spring the trap."
[779] Gary Hughes, "Lies, bombs and jihad," *The Australian* (Sydney), 16 September 2008.
[780] Ibid.

ABC television and declared that Osama bin Laden was a "great man".[781] In his interview he defended Muslims fighting against coalition forces in Iraq and Afghanistan arguing that anyone who fought in the name of God would be forgiven their sins.[782] He also claimed that he was being unduly scrutinised because of his religious beliefs. Benbrika had promised another interview for the week but was arrested beforehand.[783]

Given that the suspects had been under thorough investigation for 18 months – a fact that was well-known to the men themselves – it remains highly questionable whether any new information emerged on, or shortly before 2 November, the day Prime Minister Howard raised alarm. In fact, there is no evidence to suggest that the suspects initiated a new phase of action or began any direct preparations for an attack. Yet, the Government subsequently claimed that the arrests of 8 November vindicated Howard's announcement, the emergency recall of the Senate, and the urgent passage of the new legislation.[784] National Party Senator Ron Boswell went so far as to claim that dissenting parliamentarians now had "egg all over their face from head to toe."[785] Other commentators, however, were highly critical of the Government's handling of the matter. They argued that Howard's announcement and the recall of the Senate had itself put national security at risk by very publicly alerting the suspects that a swoop by authorities was about to take place.[786] David Wright-Neville, for instance, expressed doubt as to whether "any of the police or intelligence services would be very happy with this [the investigation] becoming public knowledge."[787] He noted that he could not "think of anything other than politics that inspired it."[788] The Commissioner of the Australian Federal Police, Mick Keelty, agreed that there was a danger that the suspects might change their behaviour as a result, but took the view that the recall of the Senate – and the attendant publicity – was a necessary step in getting the law changed so that action could be taken against the suspects.[789]

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[781] ABC, Transcript TV Program 7.30 Report, "Pre-dawn raids net terrorism suspects," 8 November 2005; <http://www.abc.net.au/7.30/content/2005/s1500743.htm>.

[782] Benbrika further states that "according to my religion, jihad is a part of my religion and what you have to understand is that anyone who fights for the sake of Allah, when he dies, the first drop of blood that comes from him out all his sin will be forgiven." Ibid.

[783] On 3 February 2009, the Supreme Court of Victoria sentenced Benbrika to 15 years jail with a non-parole period of 12 years. Other members of his group were also convicted of terrorism-related offences; see, e.g., Mex Cooper, "Benbrika jailed for 15 years," *The Age* (Melbourne), 3 February 2009. All defendants have subsequently lodged appeals; see, e.g., "Appeals lodged in terrorism case," *The Age* (Melbourne), 24 February 2009.

[784] Brendan Nicholson with Fergus Shiel, "Rushed Law Change Justified, Says Howard," *The Age* (Melbourne), 9 November 2005.

[785] Matt Price, "Critics Lose Face, from Head to Toe," *The Australian* (Sydney), 9 November 2005.

[786] See, e.g, Lynch, "Legislating with Urgency," 751.

[787] Nicholson and Munro, "Do not expect arrests yet, says PM."

[788] Ibid.

[789] ABC, Transcript TV Program 7.30 Report, "PM, Beazley Welcome Raids," 8 November 2005; <http://www.abc.net.au/7.30/content/2005/s1500755.htm>.

The latter assertion, however, remains highly controversial. In fact, it is questionable whether the legislative change enacted by the *Anti-Terrorism Act [No.1] 2005* (Cth) was necessary and urgent as claimed by the Government. Even Chief Commissioner Nixon acknowledged that the amendment was "not critical" and that Victorian police had been "working to a point where we believe we'd have been able to take action otherwise."[790] In addition, there was a logical inconsistency at the heart of the Government's claim. As Andrew Lynch has pointed out:

> On the one hand, the intelligence pointing to the danger of a terrorist attack was sufficiently specific so as to require immediate action; but on the other hand, the amendments themselves sought to enable arrests where no plan to commit a terrorist act could be established with any particularity. The supposed deficiency of the offences was their inapplicability to situations of merely a general intention to commit a terrorist act. Surely this was not an issue on the information the Government had received? If the attack was really 'specific' or 'imminent' then why did the existing suite of preparatory offences not enable charges to be laid?[791]

Indeed, the ancillary offences that were introduced by the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) were arguably sufficiently broad to prosecute a wide range of preparatory action.[792] The Government's claim of urgency was equally open to serious criticism, in particular as the legislative change had been requested several months earlier.[793] For these reasons it remains doubtful whether the *Anti-Terrorism Act [No.1] 2005* (Cth) can be regarded as a sound and legitimate legislative policy response or whether it was yet another example of the Howard government's attempt to play politics with matter related to terrorism and national security.

2. The Anti-Terrorism Act [No. 2] 2005 (Cth)

The *Anti-Terrorism Act [No.1] 2005* (Cth) which was introduced into the House of Representatives on 2 November 2005 and passed by the Senate a day later did not contain any of the controversial measures initially contained in the COAG agreement of 27 September and the draft-legislation that was leaked by ACT Chief Minister Stanhope in mid-October. However, the Government, seemingly mindful of the general public concern generated by the Prime Minister's announcement, introduced these changes into the House of Representatives on 3 November 2005 as part of the *Anti-Terrorism Bill [No.2] 2005* (Cth). By now the Government's terror alarm had also resulted in several State and

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[790] Munro, Silvester and Allard, "'We have disrupted a large-scale attack'."
[791] See also Commonwealth of Australia, *Parliamentary Debates, Senate*, 3 November 2005, 5 (Andrew Bartlett), 6 (Kerry Nettle), 18 (Lyn Allison), 21 (Bob Brown), 31 (Christine Milne).
[792] See also the discussion in Chapter 5 above.
[793] Andrew Lynch has argued that that the *Anti-Terrorism Act [No 1] 2005* (Cth) was prompted by a misplaced fear over the manner in which courts would interpret the provisions as originally drafted; see Lynch, "Legislating with Urgency," 781.

Territory leaders backing the legislative proposals. The House subsequently referred the Bill to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 28 November 2005. Given that the legislative changes extended to about 170 pages, a three week enquiry was fairly problematic. Nonetheless, following public hearings on 14, 17 and 18 November, the Senate Committee tabled a report containing a number of recommendations, including a number of amendments. The Government considered those recommendations, and following brief consultation with States and Territories due to constitutional requirements, introduced only very minor changes. The Bill, as amended, was passed on 7 December and received royal assent on 14 December 2005.

The *Anti-Terrorism Act [No.2] 2005* (Cth) that commenced on 15 December 2005 included provisions extending the criteria for listing terrorist organisations to cover those that advocate terrorism.[794] The Act also strengthened financing terrorism offences and introduced new powers authorising the Australian Federal Police (AFP) to stop, question and search people in Commonwealth places. In particular, the amendments contained provisions that enable the Attorney-General to declare a Commonwealth place to be a "prescribed security zone" if he or she considers that such a declaration would assist in preventing a terrorist act occurring or responding to a terrorist act that has occurred.[795] Everyone in the zone may be subject to police stop, search, questioning and seizure powers, regardless of whether or not the police officer has reasonable grounds to believe the person may be involved in the commission, or attempted commission, of a terrorist act. This arrangement has been criticised by the Law Council of Australia, the Law Institute of Victoria and the New South Wales Bar as "unnecessary" and "disproportionate".[796]

Perhaps most controversial, however, the Act added divisions 104 and 105 to Part 5.3 of the *Criminal Code Act 1995* (Cth) introducing control order and a preventative detention regimes. Under these provisions, a person's liberty can be controlled or restricted *without* the person being charged or convicted of or even suspected of committing a criminal offence. While both control orders and preventative detention orders are expressly designed to protect the public from a terrorist act, they differ in an important way. Preventative detention orders are relatively short-term. They are aimed at either preventing an imminent terrorist attack or preserving evidence relating to a terrorist act that has recently taken place. Control orders, on the other hand, while still ultimately

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[794] The new "laws of sedition" have been particularly controversial but cannot be subject to closer analysis here. For an examination, see, e.g., Article 19 – Global Campaign for Free Expression, *Submission to the Australian Law Reform Commission's Review of Sedition Laws*, Issue Paper 30, London, April 2006, <http://www.article19.org/pdfs/analysis/australia-sedition-review.pdf>.

[795] *Crimes Act 1914* (Cth) s 3UI.

[796] Law Council of Australia, *Anti-Terrorism Reform Project: A Consolidation of the Law Council of Australia's Advocacy in relation to Australia's Anti-terrorism Measures*, Report, November 2008, 58; <http://www.lawcouncil.asn.au/initiatives/anti-terrorism_reform.cfm58>. See also Law Institute of Victoria, *Submission UN Special Rapporteur Report on Australia's human rights compliance while countering terrorism*, 3 May 2007; <https://www.liv.asn.au/members/sections/submissions/20070503_40/index.html>.

aimed at prevention, are not predicated on the existence of an imminent risk of terrorist attack. They may also last much longer – up to a year, with the possibility of renewal.[797]

Control orders impose a variety of obligations and restrictions on a person for the purpose of protecting the public from a terrorist act. They allow the AFP to monitor and restrict the activities of people as young as 16 years of age who pose a terrorist threat to the community without having to wait to see whether this risk materialises. The potential scope of a control order ranges from a very minimal intrusion on an individual's freedom to an extreme deprivation of a person's liberty. The order can include prohibitions and restrictions on the individual being at specified areas or places, leaving Australia, communicating or associating with certain people, accessing or using certain forms of telecommunication or technology (including the internet), possessing or using certain things or substances, and carrying out specific activities (including activities related to the person's work or occupation).[798] The order can also include the requirement that the person remain at a specified place between certain times each day, wear a tracking device, and report to specified people at specified times and places.[799] A person who contravenes the terms of a control order commits an offence with a maximum penalty of five years imprisonment.[800]

Only senior members of the AFP may seek control orders. They must first obtain written consent of the Attorney-General to request an interim order from an issuing court (the Federal Court, the Family Court or the Federal Magistrates Court).[801] Before seeking consent, the competent AFP officer must have "reasonable grounds" for either believing that:

- making the order would substantially assist in preventing a terrorist act, or

- that the person subject to the order has provided training to, or received training from, a listed terrorist organisation.[802]

In determining whether or not to grant permission to employ a control order, the competent court applies the test of "balance of probabilities".[803] The "balance of possibilities" test is merely a civil, not criminal ("beyond reasonable doubt") standard of proof. Given the serious consequences that an

[797] *Criminal Code Act 1995* (Cth) s104.5(3)
[798] Ibid.
[799] Ibid.
[800] *Criminal Code Act 1995* (Cth) s104.27.
[801] *Criminal Code Act 1995* (Cth) s104.3.
[802] *Criminal Code Act 1995* (Cth) s104.4 (interim order); s104.16 (confirmed order).
[803] *Criminal Code Act 1995* (Cth) ss104.4, 104.14, 104.24.

order may have for an individual's freedom, it is highly questionable whether the civil standard of proof is appropriate.

In addition, the *Anti-Terrorism Act [No.1] 2005* (Cth) created a new regime for preventative detention orders. The new division 105 of the Criminal Code provides for a preventative detention regime that allows the AFP to take a person into custody and detain them to prevent a terrorist attack occurring, or preserve evidence of a recent terrorist attack.[804] Where a preventative detention order is sought to prevent a terrorist act, the AFP must establish that detaining the person is reasonably necessary for the purpose of substantially assisting in preventing a terrorist act. It must also be shown that:

- there are reasonable grounds to suspect that either the person will engage in a terrorist act, the person possesses a thing connected with the preparation for or engagement in a terrorist act, or the person has done an act in preparation for or planning a terrorist attack, and a terrorist act is imminent, or

- a terrorist act has occurred in the last 28 days and detaining the person is necessary to preserve evidence of or relating to a terrorist act.[805]

The maximum period of detention under the preventative detention regime is 48 hours.[806] The preventative detention order provisions of the *Criminal Code Act 1995* (Cth) interact with state and territory provisions which also allow preventative detention for a maximum period of up to 14 days.[807] Subject to the existence of a prohibited contact order, the person detained may only contact a number of people while in detention, including a lawyer, a family member, their employer and another person at the discretion of the police officer.[808] A prohibited contact order can be made where it is reasonably necessary to preserve evidence of, or relating to, a terrorist act. Other than verifying the person's identity, members of the AFP (or ASIO) are not allowed to question him/her.[809] However, the order may be used to take potentially dangerous people off the streets for a day or two while the AFP considers laying charges or ASIO prepares an application for questioning.

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[804] *Criminal Code Act 1995* (Cth) s105.4
[805] Ibid.
[806] *Criminal Code Act 1995 (Cth)* s 105.14.
[807] See Part 2A of *Terrorism (Police Powers) Act 2002* (NSW); *Terrorism (Preventative Detention) Act 2005* (Qld); *Terrorism (Preventative Detention) Act 2005* (SA); *Terrorism (Preventative Detention) Act 2005* (Tas); *Terrorism (Community Protection) (Amendment) Act 2006* (Vic); *Terrorism (Preventative Detention) Act* 2005 (WA); *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT); Part 2B of *Terrorism (Emergency Powers) Act* (NT).
[808] *Criminal Code Act 1995* (Cth) ss105.14A-105.17.
[809] Ibid.

The control order and preventative detention regimes have no precedent in Australia and raise a number of serious concerns.[810] First, it may be argued that the arrangements give the Government a "second chance" to deprive someone of their liberty even after they have been acquitted in a fair trial or had any convictions quashed on appeal.[811] Second, the control order and preventative detention regimes pose a challenge to the traditional purpose of legal regulation and are highly problematic in relation to the fundamental rights to liberty and to a fair trial respectively. Persons on whom orders are served do not have to be found guilty of, or even be suspected of committing a crime. As Andrew Lynch and George Williams have pointed out, "this is more than a breach of the old 'innocent until proven guilty' maxim: it ignores the notion of guilt altogether."[812] Third, in respect of both control and preventative detention orders, the individual has no right to appear personally or through legal representation so as to challenge the issuing of an order.[813] As such, the control orders and preventative detention regimes also engage several of Australia's obligations under international, in particular under the ICCPR.[814]

Defending the new measures, the Howard government frequently suggested that they were comparable to, and inspired by, the measures enacted in the United Kingdom.[815] This argument, however, was both misleading and unconvincing and hardly lent legitimacy to the Australian measures. As Greg Carne has noted, the Australian legislation "includes fewer and weaker

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[810] The constitutional validity of the control order regime has also been challenged before the High Court of Australia which held in Thomas v Mowbray that the regime is constitutionally valid and does not invest the judiciary with powers contrary to Chapter 3 of the Constitution. *Thomas v Mowbray* (2007) 237 ALR 194. See also Andrew Lynch and Alex Reilly, "The Constitutional Validity of Terrorism Orders of Control and Preventative Detention," *Flinders Journal of Law Reform* 10, no. 1 (2007): 105-142; James Renwick, "The Constitutional Validity of Prevention Detention," in Andrew Lynch, Edwina MacDonald and George Williams (eds.), *Law and Liberty in the War on Terror* (Sydney: Federation Press, 2007) 127-135.

[811] Law Council of Australia, Report, November 2008, 67.

[812] Andrew Lynch and George Williams, *What Price Security?* (Sydney: UNSW Press, 2006) 42.

[813] *Criminal Code Act 1995* (Cth)) ss 105.8, 105.12 and 105.18.

[814] For a detailed analysis, see, e.g., Sydney Centre for International and Global Law, *Submission to the ICJ Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights*, 9 March 2006, <http://ejp.icj.org/IMG/AustraliaSCIGL.pdf>. As far as the UK measures are concerned, a 2007 report by the Parliamentary Joint Committee on Human Rights in the United Kingdom is particularly instructive. The Committee held that control orders issued by the British government to limit the movement and conduct of uncharged terror suspects violate the European Convention of Human Rights (the European equivalent of the ICCPR). In addition, the Committee found that the deficiencies in the adequacy and practical effectiveness of the due process safeguards in the control orders regime, and in particular the lack of opportunity to challenge closed material, made the regime as a whole incompatible with the right to a fair trial in the determination of a criminal charge and to a fair hearing in the determination of civil rights and obligations, and with the equivalent common law right to a fair trial and a fair hearing. See, Joint Committee on Human Rights - Eighth Report, Session 2006-7, <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/60/6002.htm>.

[815] The Hon John Howard, MP, "Counter-Terrorism Laws Strengthened," Media Release, 8 September 2005, <http://pandora.nla.gov.au/pan/10052/20051121-0000/www.pm.gov.au/news/media_releases/media_Release1551.html>.

safeguards and review mechanisms – as such, it is another confirmatory example of the practice of selective internationalism."[816] Indeed, the Australian and British schemes are hardly comparable.[817]

First, it may be argued that the threat scenario in the United Kingdom was distinctively different from the situation in Australia. Second, the political context in Australia was very different from the United Kingdom's. In the United Kingdom the legislative changes were introduced only after the House of Lords, in the *Belmarsh detainees* case, had declared the previous detention regime (as stipulated by part 3 of the *Anti-Terrorism, Crime and Security Act 2001*) unlawful.[818] Also, the introduction of the control order regime in the United Kingdom led to a constitutional crisis, a Labor back-bench rebellion and much debate in the Parliament, the public and the media.[819] In Australia, on the other hand, the legislative changes were rushed through Parliament with comparatively little scrutiny and debate. With the Government winning control of the Senate in 2005, the brief enquiry held Senate Legal and Constitutional Committee into the *Anti-Terrorism Bill [No.2] 2005* (Cth) was more a political formality than effective parliamentary scrutiny.

Third, the British scheme of preventative detention is different from the one in place in Australia. In the United Kingdom, the police may detain a person who is reasonably believed to be a terrorist for up to 48 hours for a number of purposes, but the prevention of an 'imminent' terrorist act is not one of them. Any extensions of the detention period can only be authorised if there are "reasonable grounds for believing that the further detention (...) is necessary to obtain relevant evidence," whether by questioning or by preservation. The British system thus has a strong investigatory purpose and is designed to facilitate the laying of charges. The Australian scheme does not have a similar focus. As indicated earlier, the AFP may not even question a person subjected to a preventative detention order.

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[816] Greg Carne, "Gathered Intelligence or Antipodean Exceptionalism? Securing the Development of ASIO's Detention and Questioning Regime," *Adelaide Law Review* 27, no.1 (2006): 1-58; see also Greg Carne, "Prevent, Detain, Control and Order?: Legislative Process and Executive Outcomes in Enacting the Anti-Terrorism Act (No 2) 2005 (Cth)," *Flinders Journal of Law Reform* 10, no. 2 (2007): 17-79.

[817] For a detailed analysis see Andrew Lynch, "Control Orders in Australia: a Further Case Study in the Migration of British Counter-Terrorism Law," *Oxford University Commonwealth Law Journal* 8, no. 2 (2008): 159-85; see also Bronwen Jaggers, *Anti-terrorism Control Orders in Australia and the United Kingdom: A Comparison*, Research Paper no. 28 (Canberra: Department of Parliamentary Services, 2008), <http://www.aph.gov.au/library/pubs/rp/2007-08/08rp28.pdf>.

[818] *A and others v. Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 W.L.R. 87.

[819] See, e.g., Clive Walker, "Keeping Control of Terrorists without Losing Control of Constitutionalism," *Stanford Law Review* 59, no. 5 (2007): 1395-1463; see generally Clive Walker, "Intelligence and Anti-terrorism Legislation in the United Kingdom," *Crime, Law & Social Change* 44, no. 4-5 (2005): 387-422. The House of Lords as well as the High Court have since quashed a number of control orders imposed on suspects in the UK; see, e.g., "Lords want control order rethink," *BBC News (Online)*, 31 October 2007, <http://news.bbc.co.uk/2/hi/uk_news/7070396.stm>; and "High Court revokes control order," *BBC News (Online)*, 31 July 2009, <http://news.bbc.co.uk/2/hi/uk_news/8178341.stm>.

Finally, the United Kingdom's system contains significant safeguards which are lacking in Australia. All British law must be read against the *Human Rights Act 1998*. The United Kingdom is also subject to the European Convention on Human Rights. Both instruments ensure that the British anti-terrorism legislation conforms to internationally recognised rule of law and human rights standards.[820] In addition, an independent reviewer (Lord Carlile) and the Parliament's Joint Committee on Human Rights play important roles in supervising the operation of the laws. Australia, on the other hand, neither has a constitutional bill of rights (like the United States or Germany), nor does it have any special act of parliament protecting the citizens' basic rights and freedoms (like the United Kingdom and New Zealand). Although Australia has been a party to the ICCPR since 1980, it has failed so far to give domestic effect to its international obligations (again in contrast to the United Kingdom).[821] In addition, Australia has been lacking an independent monitoring body or committee comparable to the United Kingdom institutions.[822]

3. Proportionality

It is difficult to see how the measures introduced by the *Anti-Terrorism Act [No.1 and 2] 2005* (Cth) constitute a proportionate response to the threat of terrorism. In particular, the control order and preventative detention regimes can hardly be regarded as a necessary and strictly appropriate response. As the Law Council of Australia has noted, at the time the measures were introduced no fewer than thirty-one Commonwealth Acts had provisions which provided for the prevention and prosecution of terrorist acts. For example, under the *Criminal Code Act 1995* (Cth) it was an offence to attempt, procure, incite or conspire to commit any offence, including terrorist related offences, and such offences incurred the same penalties as the completed offence.[823] Each of these offences allows police to take pre-emptive action to prevent terrorist acts.[824] However, unlike the control order and preventative detention regimes they require police to establish a connection between a suspect and the planned commission of a particular offence before action can be taken to arrest and charge a person.

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[820] See also George Williams and Edwina MacDonald, "This plodding monster faces its own day of judgement," *Sydney Morning Herald* (Sydney), 30 August 2006.
[821] This has led to commentators calling for an Australian Bill of Rights, see, e.g., George Williams, *The Case for an Australian Bill of Rights: Freedom in the War on Terror* (Sydney: University of New South Wales Press, 2004).
[822] See also Christopher Michaelsen, "Australia's Antiterrorism Laws Lack Adequate Oversight Mechanisms," *Democratic Audit of Australia*, November 2005;
<http://democratic.audit.anu.edu.au/papers/200511_michaelsen_anti_terror.pdf>.
[823] Law Council of Australia, Report, November 2008, 67.
[824] Part 2.4 of the *Criminal Code Act 1995* (Cth).

The proportionality of the amendments is further called into question by the measures' potential for arbitrary or inconsistent application. The broad scope of the control order and preventative detention regimes can effectively target any person suspected of involvement, even peripheral involvement, in terrorist activity. For example, there is no need to demonstrate a link between the person subject to the order and any particular or likely terrorist offence. A person can be detained under the regime in the knowledge that no relevant offence has been committed. This means that control orders effectively render some individuals, namely those who have trained with a listed terrorist organisation, at constant risk of having their liberty curtailed.[825] Once branded a risk, a person remains vulnerable to executive intrusion, since there is no obvious expiration date on a person's "potential terrorist" status.[826]

Further proportionality concerns stem from the fact that the control order and preventative detention regimes lack mechanisms for independent, regular and comprehensive review Decisions made under section 104.2 or Division 105 of the *Criminal Code Act 1995* (Cth), for instance, are excluded from judicial review under the *Administrative Decisions (Judicial Review) Act 1997* (Cth).[827] This makes it very difficult for persons subject to a control order or a preventative detention order to ascertain the true basis for the order being made, challenge the legality of the order, or challenge the conditions of their detention.[828] In addition to the lack of adequate judicial review, the control order and preventative detention regimes lack meaningful parliamentary oversight. While legislation includes a 10-year sunset clause, little provision is made for regular parliamentary review of the regimes.[829] Under section 104.29 of the *Criminal Code Act 1995* (Cth), the Attorney-General must prepare and table in Parliament an annual report on the operation of control orders.[830] In practicality, however, the AFP prepares this report and presents it to the Attorney-General.

In light of these shortcomings, the control order and preventative detention regimes continues to raise serious concerns in relation to their proportionality. In particular, the Howard government failed to establish the need for such unprecedented measures. Moreover, it did not demonstrate that the control order and preventative detention regimes constituted the least restrictive means for achieving the objective of preventing terrorism. Finally, the absence of safeguards and adequate structures for review as well as the likely incompatibility of the regimes with Australia's

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[825] See also Law Council of Australia, Report, November 2008, 67.
[826] Ibid.
[827] *Administrative Decisions (Judicial Review) Act 1997* (Cth) Schedule 1 s3 (dab), (dac).
[828] Law Council of Australia, Report, November 2008, 68.
[829] *Criminal Code Act 1995* (Cth), subsection 104.32
[830] See, e.g., Australian Federal Police, *Control Orders and Preventative Detention Orders*, Annual Report 2006–07, <http://www.afp.gov.au/__data/assets/pdf_file/62633/Preventative_Control06_07.pdf>.

international human rights obligations under the ICCPR cast serious doubt on the proportionality of the measures in question.

VI. Conclusion

This chapter has sought to demonstrate that the Howard government's domestic response to the threat of terrorism was distinctive for its overt political approach in shifting responsibility for, and in seeking remedy of a national security administrative and policy failure through the expansion of the legislative counterterrorism framework. At the same time, Government policies have steadily eroded fundamental rule of law principles such as accountability and scrutiny of authority, due process, separation of powers, and coherent justification for the introduction of intrusive measures. As the responses to the Brigitte, Roche and Khazal cases as well as developments in late 2005 illustrate, this erosion was reflected in the attitudes of the legislative proponents as well as in the legislative amendments themselves. At no point did the Government demonstrate adequately that the changes in law were proportional and effective in the fight against international terrorism. Indeed, one wonders why none of the legislative amendments that followed the Brigitte, Roche and Khazal cases had been included in the original anti-terrorism legislation if they were in fact indispensable in order to protect the public and to prevent terrorism. The controversies surrounding the enactment of the *Anti-Terrorism Acts [No.1 and 2] 2005* (Cth) further demonstrate that Howard government was prepared to play politics with terrorism for perceived political gain. Facing significant political pressure over the sale of Telstra and unpopular proposals to change industrial relations, the government generated alarm over "specific" information relating to a "potential" terrorist threat and urgently enacted controversial and unprecedented measures. Yet, the alarm as well as the alleged urgency and necessity remain highly questionable. The terrorism suspects that allegedly prompted the Government's scare mongering had been under intense surveillance for 18 months. Similarly, the legislative change brought about by the Anti-Terrorism Acts 2005 had been requested several months earlier.

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THE IMPACT AND EFFECTIVENESS OF AUSTRALIA'S COUNTER-TERRORISM LAW AND POLICY

I. Introduction

II. Abandoning Mamdouh Habib and David Hicks

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I. Introduction

The purpose of this final chapter is to examine the impact and effectiveness of Australia's counter-terrorism law and policy in more detail. To this end, the story of the two Australian Guantanamo Bay detainees, Mamdouh Habib and David Hicks will be subject of closer analysis. It is argued that both cases demonstrate that the Howard government was prepared to sacrifice respect for fundamental legal and moral principles in order to achieve (perceived) political gain. Attention will then be drawn to the impact of the Government's terrorism rhetoric, as well as its policy and law more generally, on domestic counter-terrorism practice and on the detention conditions for suspects on remand. The chapter will first focus on the case of Izhar Ul-Haque. This case is significant as it suggests that the Government's exaggerated portrayal of the terrorism threat emboldened ASIO and AFP agents to exceed their authority and mandate by flagrantly violating fundamental rights of terrorism suspects. The chapter will also consider the detention conditions of the defendants in the Benbrika trials. In these cases, the presiding Victorian Supreme Court judge ordered a stay of the proceedings because of the disproportional and harsh detention conditions that the accused were being held in. Furthermore, attention will be drawn to the Haneef affair which concerned the improper detention of a Gold Coast-based Indian doctor on terrorism-related charges. This mishandled case highlighted many of the concerns about Australia's anti-terrorism laws which, until then, had existed only in the abstract. The chapter will then examine the impact of the anti-terrorism laws on Australia's Muslim community. Finally, it will consider the effectiveness of Australia's domestic counter-terrorism law and policy and conclude by examining some problematic long-term consequences and effects of anti-terrorism legislation.

II. Abandoning Mamdouh Habib and David Hicks

It has been argued in the previous chapter that the Howard government did not shy away from playing politics with terrorism in order to pursue its partisan legislative agenda. This approach, however, was not limited to the process of extending Australia's legislative counter-terrorism framework. As the cases of Mamdouh Habib and David Hicks illustrate, the Government was equally prepared to sacrifice respect for fundamental legal principles for perceived partisan political gain. This lack of respect for fundamental principles led to abandoning the two Australians in Guantanamo Bay. As Malcolm Fraser, Australia's Prime Minister from 1975-1983, has put it in a 2007 article:

> The main story is not David Hicks. The main story is a willingness of two allegedly democratic governments prepared to throw every legal principle out the window and establish a process that we would expect of tyrannical regimes. That our own democracies should be prepared to so abandon the rule of law for an expedient and as I believe, evil purpose should greatly disturb all of us.[831]

Mamdouh Habib was born in Alexandria, Egypt, in 1955. After serving in the military for two years he left Egypt at the age of eighteen and went to Jordan, Lebanon, Iraq, Syria and Tunisia where he worked as a waiter and a deliveryman.[832] Habib then moved to Europe in the early 1980s and toured Italy with a circus training elephants and horses. In 1982 he moved to Sydney, married his wife Maha, and raised for children. Settling in Sydney's south-west, he took up Australian citizenship and opened a string of businesses, including a cleaning service and a café. At times he drove a cab. He lived the life of a typical immigrant.

Over the years, however, he grew more religious and more sympathetic to Muslim causes around the world. After visiting his sister in New York City in 1991, and upon return to Sydney, he started to raise funds (A$ 500) with the intention of supporting the legal costs of El Sayyid Nosair, a man who had been charged by U.S. authorities with the murder of fundamentalist Rabbi Meir Kahane. Around this time Habib first raised the suspicion of ASIO which allegedly attempted to recruit him as an informer. Habib declined. ASIO's interest was renewed in 1993 when Habib led a rally to raise funds for the blind Sheikh Omar Abdel-Rahman and others who were on trial in the US (and later convicted) for their involvement in the 1993 World Trade Centre bombing in New York City. Offering to bring Habib's parents from Egypt to Australia, ASIO appears to have stepped up its recruitment efforts but Habib remained uninterested.

In the late 1990s Habib's cleaning business went bankrupt when a lucrative three-year contract with the Defence Housing Authority was cancelled. Habib placed several angry phone calls to the housing authority which subsequently obtained an apprehended violence order against Habib and his wife. In early 2001, at a meeting with Sydney police, Habib was described as showing "signs of hostility towards government organisations and the community generally".[833] Nonetheless, a "detailed threat assessment" by the Protective Services Group concluded that there was no information to support concerns that Habib might carry out an act of violence. The police decided

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[831] Malcolm Fraser, "The US, Australia and David Hicks: Abandoning the Rule of Law," *Australians All*, 30 April 2007; <http://australiansall.com.au/archive/post/the-us-australia-and-david-hicks-abandoning-the-rule-of-law/>.

[832] The account of Habib's personal life partly draws on Michael Otterman, *American Torture: From the Cold War to Abu Ghraib and Beyond* (Melbourne: Melbourne University Press, 2007).

[833] ABC, Transcript TV Program, Four Corners, "Worst of the Worst?" 20 July 2004; <http://www.abc.net.au/4corners/content/2004/s1157599.htm>.

Habib was "a repetitious and vexatious complainant" and that "little credibility could be attributed to any threats or allegations he may make." [834]

Planning to move his family from Australia, Habib left Sydney for Pakistan in order to "find out about religious schools for the kids."[835] He arrived in Pakistan on 29 July 2001 but his exact movements after his arrival are unclear. Habib's wife, Maha, claimed he travelled only within Pakistan. The Australian government, on the other hand, claimed that Habib was in Afghanistan on 9/11 and that he is alleged to have trained with Al Qaeda.[836] Evidence to support these claims, however, remains to be produced. On 5 October 2001, Habib was in Quetta, near the Pakistan-Afghanistan border, on his way home. He befriended two German nationals, Ibrahim Diab and Bekim Ademi, who were heading home from Afghanistan. Having spent the morning shopping – Habib bought shoes for his daughter – the three men boarded a bus to Karachi. Five hours into their journey, the bus was stopped by Pakistani police and the two Germans were hauled off. Habib apparently protested which led the police to arrest him as well. Shortly thereafter, the Germans were released (uncharged) after Berlin intervened on their behalf. Habib, however, was not so lucky and did not receive any assistance from Canberra. Instead he was deported to Egypt where he was held in a Cairo detention facility for five months and repeatedly subjected to torture.[837] Habib was then transferred to US military custody, imprisoned in Afghanistan, and later sent to Camp X-Ray at Guantanamo Bay. According to his lawyer, Stephen Hopper, Habib's ordeal at Camp X-Ray involved living in a cage, sensory deprivation, being regularly beaten, electrocuted, immersed in water and having a prostitute menstruate on his face.[838]

David Hicks suffered a similar fate in Guantanamo Bay. However, apart from a love of horses and an Australian passport he otherwise had little in common with Habib.[839] Hicks was born in 1975 and grew up in Salisbury, a working-class suburb of Adelaide.[840] He dropped out of school at an early age and his father Terry sent him to a centre for at-risk youths in the Adelaide Hills where he was taught "skills to do with the land."[841] This experience led to a job as a jackaroo at cattle station

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[834] Ibid
[835] Otterman, *American Torture*, 3.
[836] The ABC's Four Corners journalists were told that while he was in Afghanistan, Habib did an advanced al-Qaeda training course in a camp near Kabul. It's claimed the course included surveillance and photographing facilities, the establishment and use of safe houses, covert travel and writing secret reports. Australian authorities say that several other men who took part in the course identified Habib as having been there.
[837] For the practice of extraordinary rendition generally, see, e.g., Stephen Grey, *Ghost Plane – The Inside Story of the CIA's Secret Rendition Programme* (London: C. Hurst & Co, 2006).
[838] "Documents reveal Habib torture allegations," *ABC News (Online)*, 6 January 2005; <http://www.abc.net.au/news/newsitems/200501/s1277343.htm>.
[839] Otterman, *American Torture*, 3.
[840] This account draws on information provided in "Chapter 2 – The Boy from Oz," in Leigh Sales, *Detainee 002 – The Case of David Hicks* (Melbourne: Melbourne University Press, 2007) 12-27.
[841] Ibid, 15.

in Katherine in the Northern Territory. When his stint in Katherine ended, Hicks returned to Adelaide and, at the age of seventeen, met Jodie Sparrow at a local rodeo. Sparrow became pregnant shortly thereafter and gave birth to two children. The family moved into a house in Salisbury and Hicks worked as a chicken boner at a nearby factory. Nonetheless, his relationship soon fell apart and his wife left him taking the children. Hicks changed jobs again and took up a position at a kangaroo slaughterhouse.

In 1998, Hicks responded to a newspaper advertisement looking for a horse trainer at a wealthy stud in Japan and got the job. Nevertheless, the position only lasted three months and Hicks returned to Adelaide, determined to travel again. He began reading books and obsessively watched CNN taking a particular interest in the Kosovo conflict. Deeply affected by television images of the slaughter, he decided to travel to Albania and to sign up with the Kosovo Liberation Army (KLA) in order to fight Serbian forces on behalf of Kosovo's Muslims. By the time Hicks arrived in Tirana, Albania, the fighting was nearly over. He briefly joined the KLA and completed four weeks of training as a volunteer fighter. Another month later, however, Hicks and other volunteers were sent home and he once again returned to Adelaide. He then applied to the Australian Army but was rejected because he had dropped out of school before year ten. By this time he had developed an interest in Islam. He began attending at a local mosque, converted and took the name Muhammed Dawood. His new Islamic faith also strengthened his desire to travel. Hicks decided to intensify his study of Islam with missionaries in Pakistan, bought a one-way ticket to Islamabad, and flew out of Adelaide on 11 November 1999.[842]

Upon his arrival in Pakistan, Hicks travelled to Lahore where he attended a madrasa. During his studies he got introduced to members of Lashkar-e-Toiba (LeT), one of the largest and most active militant organizations in South Asia.[843] He subsequently undertook training at a LeT camp and accompanied Pakistani troops along the Kashmir border. In mid-2000, however, he left Pakistan and went to Afghanistan. His letters to his father illustrate that by now Hicks had developed a deep belief in fundamentalist Islam. In April 2001 he attended a seven week military training course at a Taliban camp outside Kandahar which was followed by second course in marksmanship, kidnapping techniques and assassination methods a few weeks later. While at the camp, Hicks allegedly met Osama bin Laden several times. He was also interviewed by an Al Qaida leader and asked whether he would be willing to undertake a "martyr mission". Hicks declined, earning the contempt of fellow "students" at the camp.

[842] Ibid.

[843] The organisation is now banned as a terrorist organization in various countries including India, Pakistan, the United States, the United Kingdom, he European Union, Russia and Australia.

On 11 September 2001, Hicks was in Pakistan visiting a friend when he heard about the attacks on New York and Washington. He decided to return to Afghanistan. According to Hicks, his intention was to collect his belongings – his birth certificate, money, bags and special clothes – at a Kandahar guest house and then return to Australia. Once in Afghanistan, however, the borders closed and he was unable to leave again. According to the Australian and US governments, Hicks made a calculated decision to return to his comrades to take up the fight against the West. Hicks ended up at Kandahar airport guarding a tank and armed with a AK-47 assault rifle but never fired a shot, a fact accepted by US officials. In December 2001, he was captured by Afghan Northern Alliance forces while waiting at a taxi stand in Baghlan, hoping to get out of the country. The Northern Alliance forces then sold Hicks to the US military for a bounty of US$1,000. Hicks was fist taken to the USS *Peleliu*, an American naval vessel stationed in the Arabian Sea, and then transferred to Guantanamo Bay where he was allegedly subjected to inhuman treatment repeatedly.[844]

It is unclear, exactly when the Australian government was notified about Habib's and Hicks' respective transfers to Guantanamo Bay. What is clear, however, is that by mid January 2002, the Government's mind was made up on the two men. Although they had not been charged with anything, Government ministers demonised them as dangerous terrorists. Prime Minister Howard stated that he did not have "any sympathy for any Australian" who "knowingly joined the Taliban and Al Qaida."[845] The then Attorney-General, Daryl Williams, was like-minded. "They have been trained to be terrorists and to act in accordance with the objectives of Al Qaida. That makes them about as dangerous as a person can be in modern times."[846] Foreign Minister Alexander Downer concurred in his assessment and claimed that Hicks, as a member of Al Qaeda, deserved harsh retribution. "We are an ally of the United States and we agree with them. They're perfectly entitled to take very tough action," Downer declared.[847]

For the first two years of Habib's and Hicks' detention, the Australian government did not utter a word of protest over their denial of access to lawyers or any direct contact with their family. In contrast to the United Kingdom government, which actively pressured the Bush administration to return the British Guantanamo inmates to Britain, Canberra limited its assistance to Hicks and

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[844] "'New evidence' backs Hicks's torture claim," *ABC News (Online)*, 31 October 2005; <http://www.abc.net.au/news/newsitems/200510/s1494779.htm>.

[845] ABC, Transcript TV Program, Four Corners, "The Case of David Hicks," 31 October 2005, <http://www.abc.net.au/4corners/content/2005/s1494795.htm>.

[846] Quoted in Andrew West, "Aussies see US double standards," *The Christian Science Monitor*, 25 January 2002; <http://www.csmonitor.com/2002/0125/p06s01-woap.html>.

[847] Quoted in Richard Phillips, "Guantanamo prisoner David Hicks incarcerated in high-security Australian jail," *Melbourne Indymedia (Online)*, 6 June 2007; <http://melbourne.indymedia.org/news/2007/06/145988.php>.

Habib to providing occasional consular support. The Government never questioned the US approach to try Guantanamo Bay detainees before the unprecedented military commissions, nor did it raise any concerns about the detention and treatment of two of its own citizens. Instead, it provided full support for the Bush administration's policies and remained confident that Hicks and Habib would eventually be charged. The Government's cynical attitude towards the fate of the two Australians became once again apparent in a television interview with the federal Attorney General in late July 2004. Asked by ABC Australia's Sally Neighbour about the legal and ethical implications of the indefinite detention of Guantanamo Bay inmates, Ruddock – who succeeded Daryl Williams as federal Attorney General – declared the following:

> *Philip Ruddock*: The argument that the United States has taken is that, in this war in which they're engaged, they don't wish to release people that they believe are likely to go back and resume hostilities.
>
> *Sally Neighbour*: But that would blow away one of the most fundamental principles of the rule of law, would it not, if they were to do their time and still not be released?
>
> *Philip Ruddock*: As I understand it, one of the...one of the accepted principles in the conduct of war under Geneva Conventions is that prisoners of war are held until the end of hostilities.
>
> *Sally Neighbour*: And in this case, that could be 50 years?
>
> *Philip Ruddock*: Well, we don't know, do we? [848]

The broader public seemed to be in step with Ruddock's view that Hicks's and Habib's poor choices had landed them in Guantanamo and that they could stay there. Community and advocacy initiatives suffered from this public apathy and attracted only a handful of supporters to their rallies.[849] Preoccupied with the invasion of Iraq and other events, media attention was also limited. Newspaper clippings showed an inconsistent stream of stories about the two Australians, often buried on inside pages. In these early years, concern about Hicks and was confined to a small number of lawyers, intellectuals and human rights campaigners.

In 2004, after more than two years of detention, the US authorities eventually charged Hicks under a military commission system created by Presidential Order. Habib, on the other hand, was not charged and subsequently set free. Washington's decision to release Habib represented a severe embarrassment for Canberra. Over the course of three years, US officials continually assured their Australian counterparts that Habib would be charged, put on trial before a military court and

[848] ABC Four Corners, "Worst of the Worst?."
[849] Sales, *Detainee 002,* 92.

presumably given a lengthy jail term. Instead the US, apparently without consulting Canberra, decided in January 2005 to release Habib. Rather than returning to freedom, however, Habib returned to a hostile Australian government desperately trying to downplay the political significance of his release. Prime Minister Howard, for instance, declared that Australia did not have any apology or compensation to offer.[850] Foreign Minister Alexander Downer thought Habib's three year detention without charge was justified even in the absence of evidence suggesting any links to Al Qaida.[851] And Attorney-General Philip Ruddock announced that he would investigate whether any payment Mr Habib received for telling his story to the media could be confiscated under federal Proceeds of Crime legislation that was introduced a few months earlier.[852]

A few months later, in mid 2005, Captain Paul Willee, QC, Australia's leading military lawyer, and Lex Lasry, QC, a distinguished barrister who had been acting as an independent observer of the 2004 Hicks trial on behalf of the Law Council of Australia, expressed serious concern about the procedural flaws of the US military commission system and publicly called on the government to express its disapproval.[853] The Prime Minister, however, chose to ignore the criticisms expressed by the two eminent jurists. Asked at press conference on 2 August 2005 whether his government would intervene and make representations to the Bush administration, Howard replied:

> No we won't. We don't, I know what they've said. We don't share that view. It should be said at the outset that the consequence of the Military Commission trials not going ahead in the United States will be that David Hicks will come back to Australia and will go free without being held accountable in any way for the charges that have been made against him. That should be understood. It's often overlooked when we talk about these things. He cannot be tried for the offences; they are now offences, but they weren't offences under Australian criminal law at the time. So we have to sort of keep that in mind. I mean, the allegation against David Hicks is that he trained with Al Qaeda in Afghanistan, but amongst other things after witnessing the events of the 11th September 2001 he rejoined the people with whom he had trained, and he also trained with another group, the precise name of which escapes me, in Pakistan.[854]

By mid 2005 the Government's position in relation to Hicks was clear. Given that he had not committed any offence under Australian law, Canberra supported his detention and possible prosecution in Guantanamo Bay. As Julian Burnside QC, another renowned Melbourne barrister, has pointed out, the irony of the Howard's "Kafka-esque reasoning" was "underscored by the fact

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[850] Meaghan Shaw, "Sorry to Habib not on: Howard," *The Age* (Melbourne), 13 January 2005.
[851] "Three-year detention justified, says Downer," *Sydney Morning Herald* (Sydney), 28 January 2005.
[852] ABC Radio, Transcript, PM Program, *Government quiet on Habib's Return*, 25 January 2005; <http://www.abc.net.au/pm/content/2005/s1288992.htm>.
[853] ABC, Transcript TV Program, 7.30 Report, "Government under pressure over Guantanamo trials," 2 August 2005; <http://www.abc.net.au/7.30/content/2005/s1428676.htm>.
[854] The Hon John Howard, MP, Press Conference, Canberra, 2 August 2005; <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=(Id:media/radioprm/ibvg6);rec=0>.

that, if circumstances were reversed and America was seeking to extradite Hicks from Australia for trial, we would refuse to extradite him because he is not alleged to have done anything which was recognized at the time as an offence under Australian law."[855] Much to the disappointment of the Howard government, the proceedings against Hicks collapsed in 2006 when the U.S. Supreme Court ruled, in *Hamdan v. Rumsfeld*, that the military commission system was unconstitutional. Prime Minister Howard, however, remained unwavering and maintained that Hicks "can stay put."[856] Meanwhile, Ruddock initiated legal action to prevent Freedom of Information access to government correspondence with Washington about Hicks. And in the face of overwhelming evidence of physical and psychological abuse of prisoners, Ruddock told the media that sleep deprivation, to which Hicks had been subjected on a regular basis, did not constitute torture.[857]

Nevertheless, the Howard government, found itself under increasing pressure as public unease deepened, due in part to father Terry Hicks's and Major Michael Mori's campaign for action. Mori, a US Marines Major, had been assigned as Hicks's military defence counsel in late 2003. He not only challenged the entire military commissions system but also embarked on defence campaign marked by extensive advocacy of his client in the public and political sphere. The Hick's case gained additional pubic profile when Irish rock band U2 used the opening concert of their Australian tour to call for his repatriation to Australia.[858] By late 2006 it was clear that the public sentiment towards the Hicks was changing. Indeed, a December 2006 opinion poll showed that 67 per cent of Howard's own Liberal Party voters wanted Hicks to be brought home.[859]

Under these conditions, and facing a federal election later in 2007, the Howard government's attitude to Hicks suddenly transformed. Instead of denouncing him, senior government ministers began expressing official concerns about the delays in Hicks being charged and brought before a military commission. The Prime Minister told journalists that he was "very angry at the delay" and that he shared "the view of millions of Australians that justice delayed is justice denied."[860] The Attorney General likewise declared that "the delay is very unreasonable and inappropriate and that's why we've been arguing that it needs to be dealt with as quickly as possible."[861] Praising the Australian government for swift action in contrast, Ruddock also announced that "we have passed legislation to ensure that anybody who is prosecuted and convicted under a military commission

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[855] Julian Burnside, "David Hicks", <http://australiansall.com.au/archive/post/david-hicks/>.
[856] "Hicks can stay put: Howard," *ABC News (Online)*, 12 November 2005; <http://www.abc.net.au/news/newsitems/200511/s1505277.htm>.
[857] Richard Sproull, "Sleep deprivation is not torture: Ruddock," *The Australian* (Sydney), 2 October 2006.
[858] "Free David Hicks, demands Bono," *Sydney Morning Herald* (Sydney), 8 November 2006.
[859] Quoted in David Marr, "Australia's most wanted," *Sydney Morning Herald* (Sydney), 13 January 2007.
[860] Quoted in "Howard 'angry' as Hicks faces further delays," *Australian Associated Press*, 5 March 2007.
[861] Quoted in Brendan Nicholson, "Hicks delays unreasonable and inappropriate, says Ruddock," *The Age* (Melbourne), 3 January 2007.

process, and has a sentence to be served, can be returned to Australia under prisoner exchange arrangements."[862]

For its part, the Bush administration, recognising the mounting pressure on its loyal Australian ally, eventually responded, bringing forward Hicks's military commission hearing even before the commission rules had been completed.[863] Revised charges were filed against Hicks in February 2007 before a new commission under new Congressional legislation, the Military Commission Act 2006. Shortly thereafter, and in accordance with a pre-trial agreement concluded with Judge Susan Crawford, Hicks pleaded guilty to a single newly codified charge of "providing material support for terrorism".[864] Hicks's defence team attributed his acceptance of the plea bargain to his desperation for release from Guantanamo Bay.[865]

The pre-trial agreement drew heavy criticism in legal circles. A leading Australian human rights lawyer and former appeal judge at the UN Special Court for Sierra Leone, Geoffrey Robertson, maintained that the agreement "was obviously an expedient at the request of an Australian Government that needed to shore up votes."[866] The Law Council of Australia was equally critical and noted that the agreement was "a contrived affair played out for the benefit of the media and the public" and "designed to lay a veneer of due process over a political and pragmatic bargain."[867] According to the Law Council the agreement served to corrode the rule of law and appeared to be "an attempt to protect the credibility and interests of the US government."[868] The criticisms were not limited to commentaries in Australia. In the United States, Colonel Morris Davis, the Chief Prosecutor at Guantanamo Bay who resigned citing dissatisfaction with the military commission process, denounced the Hicks trial as flawed and rushed for the political benefit of the Australian government.[869] The latter strongly denied any involvement. Prime Minister Howard thought it "ridiculous" to suggest the sentence had been framed with the federal election in mind.[870] He declared that his government "didn't impose the sentence, the sentence was imposed by the military commission and the plea bargain was worked out between the military prosecution and Mr Hicks's

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[862] Ibid

[863] Scott Horton, "The Plea Bargain of David Hicks," *Harper's Magazine*, 2 April 2007; <http://www.harpers.org/archive/2007/04/horton-plea-bargain-hicks>.

[864] "Hicks's pre-trial agreement (full transcript)," *The Australian* (Sydney), 2 April 2007.

[865] Michael Melia, "Australian Gitmo Detainee Gets 9 Months," *Washington Post*, 31 March 2007.

[866] ABC, TV Program Transcript, Lateline, "Interview with Geoffrey Robertson QC," 17 November 2008; <http://www.abc.net.au/lateline/content/2008/s2422192.htm>.

[867] "Trial of David Hicks 'a charade'," *BBC News (Online)*, 24 July 2007; <http://news.bbc.co.uk/2/hi/asia-pacific/6913374.stm>.

[868] Ibid.

[869] Geoff Elliott, "Hicks case 'pushed to suit Howard'," *The Australian* (Sydney), 25 February 2008.

[870] "We didn't gag Hicks: PM," *Sydney Morning Herald* (Sydney), 2 April 2007.

lawyers, and the suggestion ... that it's got something to do with the Australian election is absurd."[871]

In April 2007, Hicks finally returned to Australia to serve the remaining nine months of a suspended seven-year sentence.[872] The nine-month period precluded any media contact and delayed his release until after the 2007 federal election. Australian and US critics subsequently speculated that the media ban was a condition requested by the Howard government and granted as a political favour.[873] Howard, on the other hand, denied that the media ban had anything to do with itself or the nearing federal election.[874] Hicks served his term in Adelaide's Yatala Labour Prison and was released on 29 December 2007. However, he was immediately subjected to a 12 months control order under new anti-terrorism legislation introduced by the Howard government in the aftermath of the July 2005 London bombings.[875] The control order, which included an obligation to regularly report to police, abide by a curfew from midnight to 6 a.m. and a cancellation of Hicks's passport, expired on 21 December 2008 and was not renewed.

The Hicks and Habib cases further demonstrate that the Howard government's approach to terrorism-related matters was motivated by aspirations for partisan political benefit rather than by concern for legal or ethical principle. Over the course of six years, the Government cynically used the Hicks and Habib cases for its immediate political self-interest. From the outset it seized on the arrest and detention of the two Australians in 2001 to flag its support for the Bush administration which had its own credibility resting on getting some results out of the flawed and controversial military commissions system in Guantanamo Bay. In doing so, the Government honoured the promise given by the Prime Minister at a press conference in Washington on 12 September 2001 when he declared that "Australia will provide *all support* that might be requested of us by the United States in relation to *any action that might be taken*."[876]

Moreover, as Daniel Baldino has pointed out, "a critical factor in Howard's preparedness to stand by the Guantanamo process was based on a tradition of 'mateship' with great and powerful friends

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[871] Ibid.

[872] See also Tim McCormack, "David Hicks and the Charade of Guantanamo Bay," *Melbourne Journal of International Law* 8, no. 2 (2007): 273-91.

[873] In November 2007, allegations from an anonymous U.S. military officer, that a high-level political agreement had occurred in the Hicks case, were reported. The officer said that "one of our staffers was present when Vice-President Cheney interfered directly to get Hicks's plea bargain deal. He did it apparently, as part of a deal cut with Howard". Australian Prime Minister John Howard denied any involvement in Hicks's plea bargain. Scott Horton, "At Gitmo, No Room for Justice," *Harper's Magazine*, 22 October 2007; <http://www.harpers.org/archive/2007/10/hbc-90001470>.

[874] "We didn't gag Hicks: PM," *Sydney Morning Herald* (Sydney), 2 April 2007.

[875] Penelope Debelle, "One-year control order on Hicks," *The Age* (Melbourne), 22 December 2007.

[876] Quoted in Alan Ramsey, "Here's hoping Bush doesn't cash in our blank cheque," *Sydney Morning Herald* (Sydney), 15 September 2001 [emphasis added].

as well as a willingness to pay an insurance premium to the Bush administration in the event of any future crisis on Australian soil."[877] This tradition had a long history in Australian politics dating back to the worrying days of World War II when the country had looked to the US in the face of perceived Japanese preparations of an invasion. Furthermore, the Howard government's faithfulness in the American alliance bore a striking resemblance with the approach taken by Prime Minister Harold Holt, who, in July 1966, declared that Australia was to go "all the way with LBJ" [then US President Lyndon B. Johnson] into the Vietnam War.[878] These historical precedents notwithstanding, the Howard government itself had long worked towards strengthening the US relationship. It had concluded a free trade agreement in 2004 and negotiated closer intelligence and defence ties. It had contributed ground forces to the US-led military campaigns in Afghanistan and Iraq. As a consequence, Canberra was not disposed to risk its perceived political status in Washington over Hicks and Habib, particularly when there was little public sympathy for them in Australia.

And so it seemed that the relentless pursuit of alliance politics, Howard's own sense of his relationship with the Bush administration and Australian domestic politics led to a decision to deny two Australians fundamental protections and human rights, including the presumption of innocence and *habeas corpus*. Rather making representations to the Bush administration, Canberra implied that Hicks and Habib were terrorists well before full investigations of their activities were complete. Likewise, overwhelming evidence of highly questionable US practices such as the rendition, torture and other violations of basic rights of terrorism suspects, was simply denied while the military commissions system was hailed as "independent and "fair"[879] When the British Attorney General, Lord Goldsmith, called for the closure of the Guantanamo camps, Prime Minister Howard declared that Australia would make up its "own mind about these things" and maintained that the US had a "right" to put Hicks before a military commission.[880] Indeed, when it came to the military commissions, the Bush administration was treated "like a cheating spouse: every time it was caught out, Australia gave it one more chance, only to be humiliated again."[881]

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[877] Daniel Baldino, "Searching for the National Interest," in Chris Aulich and Roger Wettenhall (eds.), *Howard's Fourth Government* (Sydney: University of New South Wales Press, 2008) 250.
[878] Quoted in Glen St. J. Barclay and Joseph M. Siracusa, (eds.), *Australian-American Relations since 1945: A Documentary History* (Sydney: Holt, Rinehart and Winston, 1976) 77.
[879] "Hicks to face 'fair hearing'," *Sydney Morning Herald* (Sydney), 10 December 2006.
[880] Quoted in Daniel Baldino, "David Hicks' rights under natural law," *Eureka Street* 16, no. 8 (10 July 2006); <http://www.eurekastreet.com.au/article.aspx?aeid=1221>.
[881] Baldino, "Searching for the National Interest," 241.

III. The Impact on Domestic Counter-Terrorism Practice and on the Detention Conditions of Suspects on Remand

1. The Case of Izhar ul-Haque

Izhar ul-Haque was a young medical student at the University of New South Wales in Sydney. In early 2003, he travelled to Pakistan to attend a training course with Lashkar-e-Toiba, a group which was subsequently (in late 2003) proscribed by the Australian government as a "terrorist organisation" but had not been listed at the time. Following his three-week training course, however, ul-Haque decided not to go ahead with his preparation for a jihad in Kashmir after having been told he would better serve his cause as a doctor, not a martyr.[882] On his return to Australia in late March 2003, ul-Haque's baggage was searched at Sydney airport and Customs officers seized a number of books, printed material and notebooks as well as a letter to his parents indicating that Izhar intended to join LeT.[883] Ul-Haque was then allowed to go freely on his way and was not subjected to any further action by the authorities, at least any action which came to his attention.

Several months later, on 6 November 2003, however, around twenty ASIO and five police officers, all in plain clothes, subsequently attended with a search warrant at the home where ul-Haque lived with his parents and three brothers. The ASIO officers were waiting for ul-Haque and his 17-year-old brother in a railway station car park on that November day as the brothers were returning from university. The officers told ul-Haque that he was in "serious trouble", bundled him into a car, took him to a local park and forced him to answer questions. They took his frightened brother along as well – an action described by New South Wales Supreme Court Justice Michael Adams as "highhanded".[884] Despite having no authority to do so, the ASIO officers gave ul-Haque the distinct impression that he had to cooperate with them and answer their questions. If he did not, he reasonably assumed they might beat him up or take him to another sinister location. As Justice Adams has observed:

> The officers were dealing with a young man of twenty-one years. It is obvious that any citizen of ordinary fortitude would find a peremptory confrontation of the kind described by the ASIO officers frightening and intimidating. Furthermore, the fact that he was being taken to a park rather than any official place would have added an additional unsettling factor. I do not think it can be doubted that this was precisely the effect that was intended.

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[882] Ellen Connolly, Les Kennedy, Louise Dodson and Matt Thompson, "Sydney man trained for terror, court told," *Sydney Morning Herald* (Sydney), 16 April 2004.
[883] *R v Ul-Haque* [2007] NSWSC 1251, para 12.
[884] Ibid, para 18.

After the interrogation in the park, ASIO officers took ul-Haque back to his home and kept him in his parents' bedroom "incommunicado" and "under colour of the warrant."[885] The officers also proceeded to interview him again until 3.45 a.m. the next morning. After a few hours sleep, Ul-Haque, a diligent student, went back to the university to attend classes. However, in the afternoon of the same day he was requested to answer further questions and directed to visit a local police station in order to be interviewed by the AFP. Further interviews were conducted by the AFP on 12 November 2003 and 9 January 2004 and ul-Haque was repeatedly assured that his brief attendance at a LeT camp was not an issue of serious concern. In fact, the law enforcement authorities admitted to him that they accepted that his connection to the organisation had nothing to do with Australia but instead related to his opposition to the Indian presence in Kashmir.[886] As a consequence, an AFP report from 12 November 2003 noted that the medical student was of "no immediate danger," but that he "may be able to be used as a source."[887]

It seems almost certain that the action taken against ul-Haque by ASIO and the AFP was instigated because oh his connections to Faheem Lodhi. As discussed in Chapter 4 of this thesis Lohdi was subsequently convicted of preparatory terrorism offences in 2006.[888] Ul-Haque had met Lodhi at a family occasion long before he went to Pakistan in early 2003. It seems his mother and Lodhi's wife were good friends. His relationship with Lodhi developed and was, perhaps, the major reason for ul-Haque's decision to attend training at a LeT camp in Pakistan. At all events, it appears that he had some continuing communication with Lodhi after his return and that it was this that excited the interest and instigated the actions of the authorities that led to the interviews.[889]

During the interviews, the AFP officers encouraged ul-Haque to become an informant against Lodhi. Ul-Haque, however, declined saying: "I did not know much about Lodhi and what it seemed like, from all the searches and investigations, that he was somewhat a dangerous person (...) I cannot have a double face and, I'm sorry, I won't be able to do this for you."[890] The AFP then considered charging him with a terrorism-related offence believing that a charge would further pressure ul-Haque to change his mind and assist in the investigation of Lohdi. As AFP officer Bruce Pegg has noted in testimony before the NSW Supreme Court, the AFP "wanted to give very long consideration to use him as a witness. (...) The matter of charging or not charging him was obviously closely aligned to that."[891] An ASIO briefing received from another agent, Jennifer Hurst,

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[885] Ibid, para 44.
[886] Tom Allard, "Agents tried to turn student into informer," *Sydney Morning Herald* (Sydney), 14 November 2007.
[887] Ibid.
[888] See Chapter 4 above, 113.
[889] *R v Ul-Haque* [2007] NSWSC 1251, para 13.
[890] Allard, "Agents tried to turn student into informer."
[891] Ibid.

dated 18 December 2003, was even more explicit: "AFP are hoping to use ul-Haque against Lodhi, although he is not co-operating at the moment. We believe when he is charged he may change his mind."[892]

On 15 April 2004, four months after he had rebuffed the AFP, ul-Haque was arrested and charged with one count of "intentionally receiving training from a terrorist organisation."[893] He was then taken to an isolation cell at Goulburn Prison, the highest security prison in the country.[894] While serving six weeks on remand, in solitary confinement, the AFP further interrogated ul-Haque, illegally and without contacting his lawyer or offering the caution that his comments could be used against him. According to AFP officer Pegg, police also pressured ul-Haque once again to assist in the matter of Lodhi.[895] When he refused to do so, he was threatened that there would be serious and adverse consequences for him. His lawyers, however, subsequently managed to apply for bail. During the bail hearing before the NSW Supreme Court on 27 May 2004, the Crown stated that despite the terrorism-related charge, ul-Haque was not considered "a threat to Australian society."[896] The Court also heard from a senior NSW corrections official, who could not explain why ul-Haque had been given such harsh confinement so quickly.[897] Bail was then granted.

Further evidence to explain the motivation behind ul-Haque's arrest was subsequently revealed in the proceedings before the NSW Supreme Court in October 2007. A senior AFP counter-terrorism officer testified that police had been told to charge "as many suspects as possible" in order to test the new anti-terrorism legislation enacted in 2002.[898] As the AFP officer explained:

> At the time we were directed, we were informed, to lay as many charges under the new terrorist legislation against as many suspects as possible because we wanted to use the new legislation. (...) So regardless of the assistance that Mr Ul-Haque could give, he was going to be prosecuted, charged, because we wanted to test the legislation and lay new charges, in our eagerness to use the legislation.[899]

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[892] Ibid.
[893] *Criminal Code Act 1995* (Cth) s 102.5.
[894] Goulburn prison is the most secure prison in Australia. Its High Risk Management Unit (HRMU), opened in September 2001 and conforms to US Supermax-like standard.
[895] Allard, "Agents tried to turn student into informer."
[896] *R v Ul-Haque*, 071879/04, Judgment on application of bail, 27 May 2004; <http://www.aph.gov.au/library/intguide/law/docs/UlHaque27May2004bailjudgment.pdf>.
[897] Ibid.
[898] Sally Neighbour, "Haunted by Haneef," *The Australian* (Sydney) 17 August 2009.
[899] Ibid. Similar comments were subsequently made by the AFP Commissioner Mick Keelty who stated in late 2007: "Both in the UK and in Australia we are testing the courts. We make no apologies for that, I think it's part of the work police do ... and will help prevent a (terrorist) attack here. We're not going to get perfect results each and every time. People need to understand it is a very different operating environment". Quoted in Dan Box, "Keelty attacked for 'court testing'", *The Australian* (Sydney), 17 December 2007.

On 12 November 2007 the "case" against ul-Haque spectacularly fell apart. Justice Adams ruled that the AFP records of interview were inadmissible because of the improper and oppressive conduct of the AFP officers involved, and because of the inextricable links between the AFP and ASIO including the disclosure by the AFP to ASIO of what ul-Haque had said in interview. Justice Adams further found that ASIO officers had engaged in improper conduct during the investigation. He held that ul-Haque was falsely led to believe that he was legally compelled to comply with the ASIO officers. This conduct "amounted to a gross breach of the powers they had been granted under a search warrant which had been issued to them."[900] Moreover, Justice Adams held that the conduct of the ASIO officers constituted:

> an unjustified and unlawful interference with the personal liberty of the accused. So far as their conduct in his parents' home is concerned, it also constituted an unlawful trespass against the occupants, since they gained admittance under colour of the warrant which did not authorise what they did: keeping the accused incommunicado in a bedroom, let alone subjecting him to compulsory questioning.[901]

Justice Adams then found that the conduct of two of the investigating ASIO officers constituted the criminal offences of false imprisonment and kidnapping at common law and also an offence under the *Crimes Act 1900* (NSW).[902] The judge's findings subsequently forced the Crown to withdraw its case.[903]

2. The Detention of the Accused in the Benbrika Trials

The so-called Benbrika trials shed further light on the extraordinary treatment of terrorism suspects while being detained on remand. As discussed in detail in Chapter 5, Abdul Nacer Benbrika and several of his associates were arrested in November 2005 following a high-profile counter-terrorism operation in Sydney and Melbourne. A few days earlier, Prime Minister Howard had warned publicly about a "potential" terrorist threat and recalled the Senate for an emergency session to pass new anti-terrorism legislation. Immediately after Benbrika and his associates were arrested, senior police officials, politicians and several media outlets began portraying Benbrika and his associates as guilty "terrorists". This prompted Adam Houda, one of the defence lawyers, to complain that

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[900] *R v Ul-Haque* [2007] NSWSC 1251, para 44.
[901] Ibid, para 62.
[902] Ibid.
[903] An inquiry into the matter was subsequently held by the Inspector-General of Intelligence and Security, an independent body overseeing the operation of Australia's intelligence agencies. Despite Justice Adam's remarks, the IGIS found against referring the actions of the two agents to prosecuting authorities, saying there was insufficient evidence of their intention to commit an offence. Inspector-General of Intelligence and Security, *Report of Inquiry into the Actions taken by ASIO in 2003 in respect of Mr Izhar ul-Haque and Related Matters*, November 2008, 36-39.

"these matters are scandalous political prosecutions which shame this nation."[904] He further noted that "these young men are presumed innocent and at least their presumption of innocence has not yet been repealed." As a consequence, "the politicians who are engaging in point-scoring should now keep out of it."[905]

Benrika and several of his associates were charged with a range of preparatory and organisational offences related to terrorism. Mirroring the practice as applied in the ul-Haque case, they were then transferred to Barwon Prison in Geelong, a maximum security facility for sentenced prisoners rather than for prisoners on remand. For the first year, the men spent up to 23 hours per day in their cells and had very severe visitor restrictions.[906] Several changes were made to these conditions after March 2007 but the men essentially continued to be housed in single cells.[907] When out of their cells, they were permitted to mix in groups of three. On court days, they were woken before 6 a.m. and offered breakfast, which some did not eat. They were thoroughly strip-searched, handcuffed and shackled, and then placed in a van, at times waiting in the vehicle for over an hour. The vans were divided into small box-like steel compartments with padded steel seats, lit only by artificial light. They were under video surveillance at all times. The trip to court usually took 65 to 80 minutes. When court proceedings finished for the day, the defendants were transported back to Barwon Prison by the same method, returning between about 6 p.m. and 7 p.m., and thoroughly strip-searched again. They were given an evening meal, then at 9 p.m. locked in their cells for the night with lights out.

Theses detention conditions were challenged a number of times, including before the Victoria Supreme Court.[908] On 20 March 2008, the trial judge at that Court, Justice Bernard Bongiorno then found that the accused were being subject to an unfair trial because of the whole of the circumstances in which they were being incarcerated and transported.[909] Justice Bongiorno described the conditions endured as "oppressive" and as "involving incarceration in the most

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[904] ABC, TV Program Transcript, Lateline, "Police 'foil' major terrorist attack," 8 November 2005; <http://www.abc.net.au/lateline/content/2005/s1500758.htm>.
[905] Ibid.
[906] *R v Benbrika & Ors* (Ruling No 20) [2008] VSC 80 (20 March 2008).
[907] A stay application in March 2007 was not pressed when discussions between their lawyers and Corrections Victoria led to changes being made to some of their conditions. There were also, it would seem, some further concessions made even after that time. Indeed, in his affidavit of 28 February 2008 Mr David Prideaux, the general manager of HM Prison Barwon, referred to a concession made as late as February 2008 to allow the accused more time out of their cells on court days than what he said was "usual". Ibid, para 30.
[908] Earlier successful challenges included a challenge to the number of police officers present in the courtroom and a challenge to the Perspex screen dividing the accused from the Court as violating the presumption of innocence; see *R v Benbrika & Ors* (Ruling No 12) [2007] VSC 524 (12 December 2007).
[909] James Montgomery, "Terrorism trial's legacy of fairness," *Eureka Street* 18, no. 25 (9 December 2008); <http://www.eurekastreet.com.au/article.aspx?aeid=10548>.

austere conditions in the Victorian prison system."[910] Tellingly, Justice Bongiorno also found that "neither Corrections Victoria nor the Crown has ever placed any evidence before this court in any form to justify either the accused's classification or their treatment which is, in terms of this trial, intolerable."[911] The Court's ruling was partly based on psychiatric and psychological evidence which suggested that the defendants' capacity to conduct their defence and concentrate on daily court proceedings was diminished by their prison conditions. In particular, Dr Douglas Bell, a forensic psychiatrist employed by Forensicare (the government provider of psychiatric services), testified that these conditions were "likely to impact to a significant extent on the cognitive mental functions that would be required to attend to the trial process." Dr Bell further observed that the prison conditions were "undoubtedly a very austere and restrictive regime that would be challenging to the most mentally able in the community" and that an ordinary person could reasonably be expected to experience a very significant degree of psychological and emotional distress.[912]

Justice Bongiorno subsequently proceeded to outline the minimum conditions which would be necessary to remove the unfairness and allow the trial to continue. These included a change of prison from Barwon Prison to the Melbourne Assessment Prison (MAP), removal of shackles, restrictions on strip searching, treatment as normal remand prisoners and the provision of 10 out-of-cell hours on non court days. Benbrika and his associates were moved to MAP, the minimum conditions were met and the trial proceeded without many of the problems that had bedevilled it to that point because of the defendants' health. In September 2008 Benbrika and six of his associates were convicted of preparatory and organisational offences related to terrorism. All seven men lodged appeals against their convictions and sentences in February 2009.[913] Four of the accused were acquitted by the jury and a fifth was granted bail when the jury proved unable to reach a verdict. However, those acquitted have no legal recourse for the period and conditions of incarceration. As James Montgomery SC, a barrister appearing for one of the acquitted defendants, has observed, "three years in the conditions as described by Justice Bongiorno and acquitted – such is the price to be paid to maintain your innocence, plead not guilty and run a trial."[914]

[910] *R v Benbrika & Ors* (Ruling No 20) [2008] VSC 80 (20 March 2008), para 31 and 80.
[911] Ibid, para 97.
[912] Ibid, para 57.
[913] "Appeals lodged in terrorism case," *The Age* (Melbourne), 24 February 2009.
[914] Montgomery, "Terrorism trial's legacy of fairness."

3. The Case of Dr Mohammed Haneef

Dr Mohammed Haneef, an Indian doctor practising at a hospital on Queensland's Gold Coast, was arrested and detained following the London and Glasgow car-bomb incidents in late June 2007.[915] Haneef alleged connection to the British incidents was that he was second cousin to a man who died from burns suffered in the Glasgow incident and a telephone SIM card purchased by Haneef had been found with the alleged bombers' possessions. With at least tacit encouragement from a government facing a general election which had previously exploited security scares for political advantage, sections of the media treated Haneef as a prize capture.[916] It was reported, for example, that the AFP was investigating Haneef's alleged involvement in a plot to blow up a Gold Coast sky scraper.[917] The reports also alleged that Haneef may have been one of a number of people who had expressed interest in the operations of planes at premises in Queensland.[918]

Haneef was arrested at Brisbane airport on 2 July 2007 while intending to board a flight to India. He was the first person to be detained under provisions introduced by the *Anti-Terrorism Act 2004* (Cth) which enable Australian police to hold a suspect without charge for an extended period of time during which questioning up to 24 hours may occur.[919] While the detention period cannot exceed 24 hours this does not include "reasonable time" during which the questioning of the person is "reasonably suspended or delayed" and that is approved by a magistrate on application of the investigating police officers.[920] The justifications for approving an extension of the detention include the need to collate and analyse information, the fact that officials are waiting on relevant information from a place outside Australia in a different time zone or the need to arrange translation of materials.[921] These provisions led to Haneef being detained for no less than 12 days before the AFP laid charges.

The charge that was eventually was laid by the AFP concerned the SIM card Haneef had left behind in the United Kingdom and contained the allegation that this action "intentionally provided support" to a terrorist organisation.[922] This offence did not require Haneef to have actually known that the "organisation" he was supporting was a terrorist one. It was sufficient that he was "reckless" as to

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[915] "Britain under attack as bombers strike at airport," *The Times* (London), 1 July 2007.
[916] See also David Dixon, "Interrogating Terrorist Suspects: Criminal Justice and Control Process in Three Australian Cases," *UNSWLRS* 24 (2008); <http://search2.austlii.edu.au/au/journals/UNSWLRS/2008/24.html>.
[917] See, e.g., Paul Doneman, "Gold Coast terror plot," *The Sunday Mail* (Adelaide), 22 July 2007.
[918] Ibid.
[919] *Crimes Act 1914* (Cth) Pt 1C, Div 2.
[920] Ibid.
[921] *Crimes Act 1914* (Cth) s 23CB(5).
[922] *Criminal Code Act 1995* (Cth) s 102.7(2).

this fact. Despite the broad scope of the offence, the case against Haneef was weak, in particular as it was unclear whether giving the SIM card to his second cousin could be said to amount to giving it to an "organisation".[923] On 16 July 2007, Haneef was granted bail on a relatively modest, $10,000 surety after the Crown had failed to convince the magistrate that the he should be remanded in custody.[924] The bail was granted despite the fact that a presumption *against* bail operated since the adoption of certain provisions of the *Anti-Terrorism Act 2004* (Cth) which had been motivated by the Khazal bail hearing in Sydney in 2004.[925]

A few hours later, however, while bail arrangements were still being finalised, the federal Government stepped in. Immigration Minister Kevin Andrews announced that Haneef's visa had been cancelled on "character grounds" and, if released on bail, he would be taken into immigration detention immediately. Andrews further declared that the AFP was issuing a "criminal justice certificate", the effect of which was that Haneef would remain in immigration detention while legal proceedings challenging the decision were underway. The Minister stated that he was "satisfied" that the cancellation was "in the national interest" as he "reasonably suspected" that Haneef had an association with people involved in terrorism.[926] He then proceeded to selectively release passages from an AFP interview with Haneef in an attempt to justify his stance, while claiming that he was unable to release the full record on the basis that it might prejudice ongoing police investigations.[927] Haneef's lawyers, however, subsequently released the full transcript in response to negative inferences which were being made about Haneef by politicians and the police via the media. The anodyne contents of the interview deflated the Government's attempts to justify Haneef's treatment.

After the cancellation of his visa, Haneef chose not to post bail, opting instead to remain in police custody until his appeal against the visa cancellation decision could be heard. As Andrew Lynch has observed, the case against Haneef "now seemed to operate on two fronts, not easily separable despite Andrews' insistence that his actions were entirely removed from the AFP investigation."[928] In the face of mounting public pressure and noticeable inconsistencies in the allegations made against Haneef, the Director of Public Prosecutions (DPP) swiftly reviewed the available evidence. The case then fell apart and the charge against Haneef was withdrawn on 27 July 2007. The DPP's

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[923] See also Andrew Lynch, "Achieving Security, Respecting Rights and Maintaining the Rule of Law," in Andrew Lynch, Edwina MacDonald and George Williams, *Law and Liberty in the War on Terror* (Sydney: Federation Press, 2007) 226.

[924] "Doctor on terror charges granted bail," *Australian Associated Press*, 16 July 2007; <http://www.news.com.au/story/0,23599,22081609-29277,00.html>.

[925] See the discussion in Chapter 6 above, 170-75.

[926] "Andrews defends Haneef visa decision," *Australian Associate Press*, 17 July 2007. The decision to revoke the visa was given in principle support by the Shadow Minister of Immigration, Tony Burke; "Labor supports Haneef visa cancellation," *The Australian* (Sydney), 16 July 2007.

[927] Ibid.

[928] Lynch, "Achieving Security, Respecting Rights and Maintaining the Rule of Law," 226.

review revealed that the SIM card was found not, as initially reported, in the vehicle driven into Glasgow airport, but with a friend in Liverpool, some 350 kilometres away. It also confirmed that Haneef's intended flight to India was to see his newborn child rather than to escape the Australian authorities and that the apartment bomb story was based on no more than a photograph of Haneef and his wife on a Gold Coast beach.[929] In a final humiliation for the Government, the Federal Court of Australia, in a decision which was scathing about the Immigration Minister's behaviour, ruled that the visa cancellation was unlawful.[930] The Rudd government subsequently ordered an enquiry into the mishandled case which reported in 2008.[931]

4. The Significance of the Three Cases

The three cases are significant in that they suggest that the climate of fear, suspicion and contempt for the rule of law created by the Howard government's approach to the "war on terrorism" affected domestic counter-terrorism practice and negatively impacted on the conditions in which detained terrorism suspects were being held. In this climate, AFP and ASIO officers were emboldened to exceed their authority and mandate which, in the case of ul-Haque led to a disturbing level of intimidation and aggression used repeatedly in order to break the will of a young medical student. Even more alarming, the conduct of the ASIO officers in this case constituted criminal offences like false imprisonment and kidnapping at common law. It appears that government rhetoric as well as the large number of anti-terrorism laws enacted since 2002 may have contributed to the creation of a highly charged atmosphere in which law enforcements and intelligence agencies needed to deliver results. Indeed, the AFP publicly admitted that police officers were encouraged to charge as many people as possible under new anti-terrorism laws in order to "test" the courts. This approach was made at least partly possible by the broad scope of some of the new terrorism-related provisions. The AFP's practice demonstrated a worrisome tendency on the part of the police to lay terrorism-related charges not as a matter of legal principle, or as a result of a thorough investigation, but rather as a tactical move to coerce suspects to volunteer information or to encourage them to act as informants. Both the ul-Haque and Haneef cases are highly illustrative in this regard.

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[929] See also Amrit Dhillon, "Doctor's family explains plane ticket, SIM card," *The Age* (Melbourne), 5 July 2007.

[930] On 21 August 2007 the Federal Court set aside the cancellation decision; *Haneef v Minister for Immigration and Citizenship* [2007] FCA 127. The decision was subsequently upheld by a Full Court of the Federal Court. in December 2007; *Minister for Immigration and Citizenship v Haneef* [2007] FCAFC 203.

[931] The report of the Haneef inquiry, the so-called Clarke inquiry, was released in late 2008. It concluded that he evidence against Haneef was "completely deficient" and noted that ASIO had reported to the government two days after Haneef's arrest that there was no information that he was guilty of anything. The AFP's Manager Counter Terrorism Domestic, Commander Ramzi Jabbour, however, had lost objectivity and was "unable to see that the evidence he regarded as highly incriminating in fact amounted to very little." When police officers Neil Thompson and Adam Simms who interrogated Haneef refused to charge him, Jabbour personally laid the charge. <http://www.haneefcaseinquiry.gov.au/>.

A further likely consequence of the Government's colourful terrorism rhetoric as well as of its counter-terrorism law and policy was the harsh treatment of suspects detained on remand on terrorism-related charges. Admittedly, it is difficult to find concrete evidence for a direct causal link between the Government rhetoric and policy on the one hand, and the extraordinary treatment of "terrorism" detainees on the other. It seems at least plausible, however, that the Government's exaggeration of the terrorist threat, the way it framed the discourse on national security and terrorism, and the corresponding excessive legislative response contributed to a perception among law enforcement agencies that "terrorism" suspects needed to be treated differently from "normal" criminal suspects. To an objective observer it appears that the accused in the above-discussed cases were to be punished prior to the outcome of the trial and irrespective of the jury verdict. Furthermore, in all three cases a presumption of guilt existed upon arrest with the consequence that punishment was to commence immediately. In the cases of ul-Haque and Benbrika this meant that the accused were transferred to maximum security prisons and locked up in conditions worse than those for convicted mass murderers. Aside from raising serious moral concerns, it was found that this treatment compromised the fairness of the defendants' trials, a fact that in turn may have considerable implications for the legitimacy of the response to terrorism more generally.

While Haneef was held at a regular Brisbane watch house rather than a maximum security facility, the incident gave rise to similar concerns and misgivings to those arising from the ul-Haque and Benbrika cases. In spite of exceptionally weak incriminating evidence against the Gold Coast doctor, an overly eager senior AFP officer – the Manager Counter Terrorism Domestic, Commander Ramzi Jabbour – laid a questionable charge which was subsequently withdrawn by the DPP. What set the Haneef affair apart from the other two cases, however, was that it saw a direct interference by the federal government at a time where the investigation and criminal justice process was still ongoing. It appears that once it became clear that the police investigation did not result in a desirable political outcome, the Government sought other avenues to capitalise politically upon the incident and to demonstrate its tough stance on terrorism and national security. It thus invoked immigration powers to force the continued detention of a person not guilty of any offence. This response did not only fail to respect Haneef's right to liberty and security but also showed a blatant disregard for the processes of criminal justice. However, the Government's behaviour was neither entirely surprising nor novel. It somewhat followed a pattern to respond to unfavourable judicial developments by exercising executive power. This approach first became apparent in the responses to the Khazal and Roche cases in 2004.[932]

[932] See also discussion in Chapter 6 above.

IV. The Impact on Arab and Muslim Australians

It has been argued that the ul-Haque, Benbrika and Haneef cases demonstrate that the Government's terrorism-related rhetoric as well as its counter-terrorism law and policy have had a detrimental impact on the counter-terrorism practice of Australian law enforcement and intelligence agencies. There is considerable evidence to suggest, however, that the negative impact of this rhetoric and policy was not limited to affecting the treatment of terrorism suspects. On the contrary, several research studies as well as testimony before parliamentary and non-parliamentary committees show that some negative effects are being felt within the broader Muslim community.

In 2003, the Human Rights and Equal Opportunity Commission (HREOC) conducted a major study interviewing a total of 1,423 people in 69 consultations in all states and territories around Australia. In addition, 1,475 self-complete questionnaires were distributed in New South Wales (NSW) and Victoria between August and November 2003.[933] The project found a widespread perception that the Muslim community had been unfairly targeted and that there was an increase in various forms of prejudice because of race or religion.[934] These incidents ranged from offensive remarks on the bus to physical violence and high rates of reporting to the survey of innocuous events. Many respondents felt they were under surveillance by neighbours and colleagues following the federal government's national security campaign launched early in 2003. Some felt that the booklet, *Let's Look out for Australia*, which was distributed by the federal government to all homes in Australia in February 2003, unfairly targeted Muslims in particular. Several participants described how, following distribution of the booklet, their neighbours reported even routine domestic activities and family gatherings. For instance, one woman was reported to her real estate agent by a neighbour for washing her balcony with soapy water.[935] Overall the study identified three main trends within the Muslim communities: an increase in fear and insecurity; the alienation of some members of that community; and a growing distrust of authority.

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[933] Human Rights and Equal Opportunity Commission, *IsmaU – Listen: National Consultations on Eliminating Prejudice against Arab and Muslim Australians* (2004), especially 67-69. Arab and Muslim youth felt that they were particularly at risk of harassment which has led to feelings of frustration, alienation and a loss of confidence in themselves and trust in authority.

[934] Consultation participants in Perth were particularly concerned about the treatment of Muslims in counterterrorism investigations in the aftermath of the Bali bombings in 2002

[935] Ibid, 68. It was also reported that the problem is worse for people who appear to be readily identifiable as Muslim. Muslim women, who wear traditional Islamic dress (hijab), were found to be "especially afraid of being abused or attacked."

Another study was conducted by the University of Technology Sydney (UTS) and published in the Shopfront Monograph Series in 2005. Although the project did not directly analyse the impact of newly enacted anti-terrorism legislation, its key findings are confirmed the trends identified in HREOC study.[936] The UTS project focussed on data gathered through a telephone hotline that was set up by the Community Relations Commission for a Multicultural NSW (CRC) in late 2001 to receive calls relating to racially motivated attacks. Over four years the hotline received numerous calls reporting a range of incidents including physical assaults, sexual assault, verbal assaults, racial discrimination and harassment, threats, damage to property and media vilification.[937] The study concluded that these incidents produced a climate of fear and insecurity, which continues to impact these communities, and denies them the chance to enjoy a true sense of Australian citizenship.

Other research and testimony focussed on the effects of Australia's anti-terrorism laws explicitly. Andrew Lynch and Nichola McGarrity, for instance, have observed that although anti-terrorism laws are expressed in ethnically and religious neutral terms "there is a perception amongst Australia's Muslim communities that they are targeted by these laws and by those who apply them."[938] They have noted further that this perception is problematic because the creation of a diverse, yet harmonious and inclusive, society is critical to the prevention of terrorism in Australia:

> The promotion of social cohesion is integral to stopping terrorism in its tracks. More specifically, the cooperation and good relations between police and intelligence agencies and Australian Muslims is a crucial resource in unearthing and preventing potential terrorists. The ability under a range of Australian laws to pursue Dr Haneef over nothing more than his familial association with terrorism plotters in the United Kingdom understandably alarmed those in close-knit ethnic communities and must seriously have impacted on efforts to reassure Australia's Muslims they have nothing to fear from these laws.[939]

Representatives from Australia's Muslim communities have pointed out repeatedly that the complexity and breadth of offences made it more difficult for people to know with certainty whether they had committed an offence. As the Islamic Information and Support Centre of Australia has noted:

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[936] Tanja Dreher, *'Targeted': Experiences of Racism in NSW after September 11, 2001* (Sydney: UTS Shopfront, 2005).
[937] Ibid.
[938] Andrew Lynch and Nicola McGarrity, "Australia's Counter-Terrorism Laws: How Neutral Laws Create Fear and Anxiety in Muslim Communities," *Alternative Law Journal* 33, no. 4 (2008): 225-28; see also Andrew Lynch, "Should Australia's Muslim Communities really be concerned about Anti-Terrorism Laws?," *Human Rights Defender* 16, no. 2 (2007): 7-9.
[939] Andrew Lynch, Nicola McGarrity and George Williams, *Submission to the Clarke Inquiry into the Case of Dr Mohammed Haneef*, 16 May 2008;
<http://www.gtcentre.unsw.edu.au/publications/docs/pubs/Clark_Inquiry_Haneef.pdf>.

> Most people know that what they are doing is either right or wrong. With this...anti-terrorism legislation...we do not know what, how or when these laws can apply to an individual, or organisation or a group.[940]

The lack of clear, publicly available criteria for the listing of "terrorist organisations", for instance, has particularly contributed to the exacerbated fear and alienation felt by Arab and Muslim Australians who are unable to obtain a clear sense of what attributes, beyond religious and ideological commonality, render an organisation susceptible to being proscribed as a terrorist organisation. This uncertainty has given rise to concern that innocent associations may attract criminal liability. As the Australian Muslim Civil Rights Advocacy Network (AMCRAN) has explained:

> In reality, most people think of terrorist organisations as large international organisations with sufficient resources to carry out deadly attacks. However, the law is drafted so broadly that it is subject to wide application. While we appreciate that a comprehensive proscription list is not possible, the effect and implication of this is that a person could be charged with committing a "terrorist organisation" offence despite there being no known terrorist organisation until the moment he is charged. This places a heavy burden on ordinary individuals to be suspicious of all those around them. It is also clearly undesirable in that members of the wider non-Muslim community are more likely to distance themselves from Muslims.[941]

In addition, AMCRAN noted that the frequency of legislative amendments had also made dissemination more difficult and reinforced the view that legislation would be changed in response to particular circumstances.[942] This, in turn, led people to change their behaviour and there was a widespread perception among Muslims that the anti-terrorism laws limited the free exercise of speech, expression and religious beliefs and worked against community participation. AMCRAN has explained that the impact of the anti-terrorism measures was being felt in various ways:

> Firstly, people self-limit their behaviour. In other words, they overestimate the reach of the laws and they are unnecessarily cautious. For example, we have seen people not wanting to go to normal Islamic classes, or similar things, because they fear that ASIO may be watching. We have heard people telling their children not to go to protests because they would be just exposing themselves once again.[943]

These negative effects of Australia's anti-terrorism legislation have been recognised by a number of parliamentary and non-parliamentary committees. Reviewing ASIO's questioning and detention

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[940] Quoted in Parliament of Australia, Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation*, 4 December 2006, 27. See also Waleed Aly, "Muslim Communities: Their Voice in Australia's Terrorism Laws and Policies," n Andrew Lynch, Edwina MacDonald and George Williams (eds.), *Law and Liberty in the War on Terror* (Sydney: Federation Press, 2007) 198-210.
[941] Quoted in Sheller Report, 67.
[942] Quoted PJCIS Report, 27.
[943] Ibid.

powers introduced by the *ASIO Legislation Amendment (Terrorism) Act 2003* (Cth), the Parliamentary Joint Committee on ASIO, ASIS and DSD was satisfied that:

> there has been a definite impact on the Australian Muslim community as a result of the anti-terrorism legislation. The Committee found that many in the Australian Muslim community believe the Act has impacted on their civil liberties and democratic rights; that there is a lack of information about the Act; that the Act has created apprehension in the Muslim community; and that there is a perception that the Act specifically targets the Muslim community.[944]

Similar concerns were expressed by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in December 2006. In its report reviewing security and count-terrorism legislation more generally, the Committee noted that "Islamic and other community based organisations have consistently raised their concerns about a rise in generalised fear and uncertainty within the Arab and Muslim Australian communities."[945] The Committee stressed that "it was reiterated that anti-terrorism laws impact most on Arab and Muslim Australians who feel under greater surveillance and suspicion" and expressed concern about "reports of increased alienation attributed to new anti terrorist measures, which are seen as targeting Muslims and contributing to a climate of suspicion."[946]

The PJCIS' findings are comparable to those that the Sheller Committee reported a few months earlier, in June 2006. The Sheller Committee expressed "serious concerns" about the way in which the legislation is perceived by some members of Muslim and Arab communities.[947] In particular, the Committee warned that:

> Misunderstandings and fearfulness will have a continuing and significant impact and tend to undermine the aims of the security legislation. The negative effects upon minority communities, and in particular the escalating radicalisation of young members of such communities, have the potential to cause long term damage to the Australian community. It is vital to remember that lessening the prospects of 'homegrown' terrorism is an essential part of an anti-terrorism strategy.[948]

As a consequence the Committee recommended that "greater efforts" be made by the Australian government to explain the security legislation and communicate with the public, in particular the

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[944] Parliamentary Joint Committee on ASIO, ASIS and DSD, ASIO's Questioning and Detention Powers: Review of the operation, effectiveness and implications of Division 3 of Part III in the Australian Security Intelligence Organisation Act 1979, November, Canberra 2005, 78.
[945] PJCIS Report, 24.
[946] Ibid.
[947] Ibid, 142.
[948] Ibid.

Muslim and Arab communities, and to "understand and address the concerns and fears of members of those communities so that practical and immediate programs can be developed to allay them."[949]

The above discussed evidence from research reports, academic commentators, and community groups as well as testimony from parliamentary and non-parliamentary committees suggest that Australia's counter-terrorism law and policy has had a negative and worrisome impact on Arab and Muslim Australians. In many instances, counter-terrorism law and policy has led to an increase in fear and insecurity in the Arab and Muslim communities. Moreover, it has led to the alienation of some members of those communities and to a growing distrust of Australia's law enforcement and intelligence authorities. Anti-terrorism laws enacted since 2002 have particularly contributed to this development. The frequency of legislative amendments as well as the complexity and breadth of the newly enacted offences produced a climate of fear and insecurity which has the potential to undermine the very purpose of the legislation and to make it more difficult to effectively manage the threat of terrorism in the long-term. Incidentally, these findings also reinforce the argument made in Chapter 1 of this thesis that it is inappropriate to speak of balancing liberty and security. As the Australian experience suggests, civil liberties are not diminished equally for everyone. Rather, if anything is balanced at all, it is the liberty of a minority of the population – in this case, Arab and Muslim Australians – against the alleged security of the majority.[950]

V. The Effectiveness of Australia's Domestic Counter-Terrorism Law and Policy

It has been argued that Australia's counter-terrorism law and policy has had a negative impact on domestic counter-terrorism practice as well as on the detention conditions for suspects on remand. Furthermore, it has been found that the government's counter-terrorism law and policy has adversely affected Arab and Muslim. But have the policy and the laws actually been effective?

The academic literature on the effectiveness of counter-terrorism law and policy is generally rather scarce.[951] Scholars commonly agree that a response can be regarded effective when it eliminates

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[949] Ibid, 146.

[950] See also the discussion in Chapter 2 above, 25-42.

[951] Christopher Hewitt is one of the few scholars that have examined questions of effectiveness. He analysed the efficacy of emergency powers as a means of reducing terrorism in Cyprus, Italy, Spain, the United Kingdom, and Uruguay. Hewitt concluded that, in all cases, there was no recognizable pattern whereby violence declines following the introduction of emergency powers. Christopher Hewitt, *The Effectiveness of Anti-Terrorist Policies*, (Lanham, MD: University Press of America, 1984). See also Michael Freeman, *Freedom or Security: The Consequences for Democracies Using Emergency Powers to Fight Terror* (Westport and London: Praeger, 2003); Cameron Crouch analysed the effect restricting civil liberties has on an insurgent actor's loss of personnel; Cameron Crouch, *Managing Terrorism and Insurgency: Regeneration, Recruitment and Attrition* (London: Routledge, 2009).

terrorism completely or reduces the threat significantly.[952] Measuring the effectiveness of counter measures, however, is considered to be difficult as it appears that a decline in terrorist violence, or a reduction of the threat, can be the result of range of factors including ones that have no connection special counter-terrorism law and policy. Nonetheless, in spite of these difficulties scholars proposed certain benchmarks against which counter-terrorism policies and actions can be assessed. According to David Charters, for instance, "empirical yardsticks" for an assessment of efficiency include:

1. The rate of terrorist incidents in the country concerned;
2. The number of casualties resulting from terrorism;
3. The number of terrorists captured, convicted, and jailed as a result of due process, and not replaced in the terrorist group;
4. The number of terrorists "neutralized" as a result of attrition (i.e., killed or wounded) and not replaced.[953]

Charters has admitted, however, that in reality it may not so easy to measure the effectiveness of counter-measures. For instance, it is possible for the rate of incidents to decline (1) while the number of casualties increases (2). Besides, political circumstances and the social milieu that gave rise to terrorism may change. As a consequence, terrorists may abandon the "armed struggle" or terrorism may simply go "out of fashion" (regardless of any governmental counter-terrorism law and policy).[954]

Applying Charters' "yardsticks" to the Australian case, it appears that the government's counter-terrorism law and policy have been extremely successful. To this date, no terrorist attack has occurred on Australian soil in the post 9/11 era. As a consequence, no-one inside Australia has died as a result of a terrorist attack. Also, a rather small number of people have been convicted of terrorism-related preparatory and organisational offences. However, the absence of any terrorist attack or casualties may equally have an alternative explanation: Australia is simply not subject to any significant terrorist threat.

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[952] Ibid.

[953] David A. Charters, "Conclusions: Security and Liberty in Balance – Countering Terrorism in the Democratic Context", in David A. Charters, *The Deadly Sin of Terrorism: Its Effect on Democracy and Civil Liberty in Six Countries* (Westport, CT: Greenwood Press, 1994) 211, 214.

[954] Jeffrey Ian Ross and Ted Robert Gurr have suggested that this happened in Quebec, Canada after the 1970 October Crisis. See Jeffrey Ian Ross and Ted Robert Gurr, "Why Terrorism Subsides: A Comparative Study of Canada and the United States", *Comparative Politics* 21, no. 4 (1989): 405, 413. Political circumstances and a change in the social milieu were most likely the main reasons for the RAF abandoning the "armed struggle" in the mid 1990s.

Measuring the effectiveness of Australia counter-terrorism law and policy faces several hurdles. First, few details about the operation of anti-terrorism legislation are publicly available. ASIO, for instance, has been strictly concerned to maintain the security of sensitive counter-terrorism investigations. Moreover, some anti-terrorism laws contain provisions which hinder assessing questions of effectiveness. For example, the *ASIO Legislation Amendment Act 2003* (Cth) itself prevents any body from assessing whether information obtained through questioning and/or detention was of any quality at all and whether, and to what extent, the Act is an effective tool in the fight against terrorism. In particular, the Act prevents the disclosure of certain information by persons subject to a warrant or by their legal representatives for up to two years after the expiry of the warrant. These arrangements have been widely criticised.[955] As George Williams and Ben Saul have pointed out, it is "impossible for Parliament and the community to evaluate the need for, and effectiveness of, the legislation if the general nature of the information obtained through questioning remains off limits."[956]

Notwithstanding these hurdles, it is possible to make a few observations regarding the effectiveness of Australia's anti-terrorism laws. There is some evidence to suggest, for instance, that despite having been portrayed as essential, the new powers of intelligence and law enforcement agencies have rarely been used in practice. It may be argued that this reflects either the adequacy of the pre-existing laws or the ineffectiveness of legislation that provides for extraordinary powers. The arrests in Sydney and Melbourne in November 2005 as discussed in Chapter 5 are a case in point. In this case it was the goodwill and civic-mindedness of Arab and Muslim Australians rather than the enhanced arsenal of police and intelligence powers that led to the arrest of Benbrika and his associates. As David Wright-Neville has noted, these arrests would not have been possible without members of Australia's Muslim population volunteering the information that alerted police to the men in the first place.[957]

The Benbrika case is not an exception, however. To date, ASIO and AFP have made little use of their new powers. ASIO, for instance, has executed only a very limited number of questioning warrants. In 2003-04, the first year of operation of the new questioning and detention regime, ASIO sought a total of three questioning warrants.[958] An additional eleven questioning warrants were executed in 2004-05 (covering some of the persons already questioned under a previous warrant).[959]

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[955] See the discussion in Chapter 5 above, 144-57.
[956] Evidence to the Parliamentary Joint Committee on ASIO, ASIS and DSD, Review of Division 3 Part III of the ASIO Act 1979 – Questioning and Detention Powers, Parliament of Australia, Canberra, 24 March 2005, 9 (George Williams and Ben Saul) <http://www.aph.gov.au/house/committee/pjcaad/asio_ques_detention/subs/sub55.pdf>.
[957] Wright-Neville, "Fear and Loathing: Australia and Counter-Terrorism," 7.
[958] ASIO, *Report to Parliament 2003-04*, 39-40.
[959] ASIO, *Report to Parliament 2004-05*, 41.

One warrant was applied in 2005-06.[960] In 2006–08, no questioning warrants were sought at all.[961] In contrast, since 2003, no questioning *and* detention warrants have been employed. Similarly, the AFP has so far not applied for any preventative detention orders. However, two control orders have been issued: one on David Hicks upon his release from detention in Australia, and one on Jack Thomas following his acquittal of terrorism charges in a Melbourne court. The small number of questioning warrants and control orders (and the absence of applications for questioning and detention warrants and preventative detention orders) make it difficult to reach any definite conclusions in relation to the effectiveness of the new powers. Nonetheless, the limited application of the powers in practice casts doubts as to whether they are strictly required as an essential component of the counter-terrorism tool kit of Australian intelligence and law enforcement agencies.

Similar observations may be made regarding terrorism-related prosecutions. Since 2002, 32 Australian men have been charged with terrorism offences.[962] The charges were dropped against three of the men. One pleaded guilty to the terrorism charges before trial. Twenty-one of the men have been placed on trial. The trials of sixteen of these men have now concluded. Nine men have been convicted of at least some of the terrorism charges against them. Six men have been acquitted. The jury was unable to reach a verdict in relation to another of the men. A further five men are currently on trial, and the trials of seven men are yet to commence. What is perhaps most remarkable, however, is, that *none* of the 32 men was charged with actually engaging in a terrorist act. Most charges related to possessing a thing or engaging in an act in preparation for a terrorist attack. As discussed earlier, the particular conduct that has been alleged included, for example, making inquiries about explosives, investigating potential sites for a terrorist attack, possessing or contributing to jihadi material, and giving or receiving practical advice about how to carry out a terrorist attack. The judicial consideration of Australia's anti-terrorism laws, of course, provides only a narrow perspective on their rate of use and effectiveness. Nevertheless, it can be observed that in spite of the prolific legislative activity seen in the past seven years, few prosecutions have resulted from the legislative amendments and even fewer convictions.

[960] ASIO, *Report to Parliament 2005-06*, 45.
[961] ASIO, *Report to Parliament 2007*-08, 34; *Report to Parliament* 2006-07, 45.
[962] The stock take of terrorism-related prosecutions and cases draws on information provided by Nicola McGarrity, "'Testing' our Counter-Terrorism Laws: The Prosecution of Individuals for Terrorism Offences in Australia," *Criminal Law Journal* 33, no. 4 (2009): 201-35.

VI. The Normalisation of Extraordinary Measures

While it is difficult to measure the effectiveness of Australia's anti-terrorism legislation, it may be observed that there is evidence of a worrisome trend towards adopting similar legislation in non-terrorist contexts.[963] For example, in September 2008, the South Australian *Serious and Organised Crime (Control) Act 2008* came into effect. The legislation was justified by the South Australian Premier Mike Rann on the basis that organised crime groups "are terrorists within our community."[964] At the heart of this legislation was the establishment of a regime for the executive proscription of organised crime groups. The Act also created derivative offences for "associating" with an organised crime group and enables courts and serious police officers to issue control and public safety orders respectively. This proscription regime draws heavily on Divisions 102 and 104 of the *Criminal Code Act 1995* (Cth), which respectively create a regime for the proscription of terrorist organisations and enable the issuing of control orders in relation to suspected terrorists.[965] By broadly equating the organised crime and terrorism contexts, it was unnecessary for legislators to undertake a precise assessment of the threat posed by serious and organised crime groups and whether this threat in fact justifies the proscription of such groups.

The normalisation of extraordinary powers (and the shift in the dialogue about these) is also apparent from events in New South Wales in 2009. The *Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Bill 2009* (NSW) was introduced into the Legislative Assembly on 4 March 2009. After less than two hours of debate on 11 March 2009, the Bill was passed by the Legislative Assembly. The Bill was introduced into the Legislative Council on the same day. After less than five hours of debate on 24 March 2009, the Bill was passed (with limited amendments) by the Legislative Council. The Bill replicated provisions of the *Terrorism (Police Powers) Act 2002* (NSW) which gave police the power to conduct covert searches of premises for investigation of terrorism offences but extended these powers to *any* offence carrying a sentence of seven years imprisonment or more. Covert search warrants authorise the entry and search of peoples' homes without their knowledge. Indeed, the people will remain unaware of the search for up to three years afterwards.

Another example is the *Crimes (Criminal Organisations) Control Act 2009* (NSW). While the NSW government initially indicated that this Bill would not be introduced until June 2009, the legislation

[963] See also Ben Golder, Andrew Lynch, Nicola McGarrity and Christopher Michaelsen, *Submission to the National Human Rights Consultation on National Security and Terrorism*, 18 May 2009.
[964] "Mike Rann calls on states to adopt SA's anti-bikie laws," *The Advertiser* (Adelaide), 23 March 2009.
[965] See also the discussion in Chapter 6 above, 183-89.

was introduced into the Legislative Assembly on 2 April 2009 without notice, most likely in response to "bikie-gang" violence that killed a man at Sydney airport.[966] In contravention of the usual procedure for urgent legislation, which requires parliamentarians to have five days' notice, the Bill was debated for just under two hours and then transmitted to the Legislative Council. It was passed by the Legislative Council just before midnight. Dr John Kaye has expressed the concern of a number of parliamentarians about the speed with which the Bill was being considered by the Legislative Council:

> If the suspension of standing orders goes ahead it will mean not only that this House will not have the right to give proper consideration to the legislation but also that the people of New South Wales will not have an opportunity to see it. The first time the Greens saw it was this morning. We have not yet seen in print the Minister's second reading speech, and we have not yet been able to read the debate in the other House. Under these circumstances it is impossible to give legislation of this nature – which has such draconian implications not only for biker gangs but also for everyone throughout New South Wales – the consideration it deserves, given the principles it undermines. [967]

The *Crimes (Criminal Organisations) Control Act 2009* (NSW) is based on the South Australian legislation (discussed above), and allows for the proscription of organisations by the courts if, for example, the organisation is a risk to public safety and order in New South Wales. On such an application, the rules of evidence do not apply, with the court being able to receive hearsay evidence and evidence of *suspected* criminal activities, and the standard is "on the balance of probabilities" rather than "beyond reasonable doubt". Once proscribed, a control order may be issued in relation any member of an organisation. It is an offence for two people, both under control orders, to associate with one another. The penalty is two years imprisonment for a first offence. Despite the urgency with which this legislation was passed, like the South Australian legislation, no organisation has yet been proscribed. Presumably this reflects either the adequacy of the pre-existing criminal laws in dealing with organised criminal activity or the ineffectiveness of a law that penalises association.

This brief discussion of recent legislative developments in South Australia and New South Wales illustrate a highly problematic trend that extraordinary laws are being adopted in contexts other than terrorism / counter-terrorism.[968] Laws enacted to proscribe "bikie" gangs and other organisations

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[966] "Man killed in Sydney airport brawl," *ABC News (Online)*, 22 March 2009; <http://www.abc.net.au/news/stories/2009/03/22/2522913.htm>.

[967] Parliament of New South Wales, *Parliamentary Debates*, 2 April 2009, 14331 (John Kaye). <http://www.parliament.nsw.gov.au/prod/PARLMENT/hansart.nsf/V3Key/LC20090402037>.

[968] Queensland is considering to follow South Australia and NSW in introducing new laws to "fight criminal bikie gangs" and Queensland Police Commissioner Bob Atkinson has called for the anti-bikie laws to be rolled out across the country. "UN report slams 'extreme' bikie laws," *ABC News (Online)*, 3 September 2009;

considered to be a "risk to public safety" essentially copied the controversial arrangements of federal anti-terrorism legislation. This legislative "plagiarism", however, was not limited to adopting provisions similar to those of federal legislation. Rather, the state laws were passed in great haste and without proper time given to parliamentary scrutiny of the proposals. As such, the inferior legislative process mirrored the way in which many anti-terrorism laws were enacted since 2002.

VII. Conclusion

This final chapter has sought to shed light on some of the negative impacts of Australia's counter-terrorism law and policy as developed and implemented under the Howard government. The cases of the Australian Guantanamo detainees, Habib and Hicks, illustrated that the Government's contempt for fundamental moral and legal principles was not limited to the legislative and judicial processes in Australia. Rather, the Habib and Hicks cases revealed that the Government was prepared to abandon two of its own citizens for the sake of supporting the Bush administration's "war on terror" including its highly controversial system of military commission in Guantanamo Bay. Finding itself under increasing pressure as public unease deepened, the Howard government repeatedly attempted to put the best possible spin on the situation. Yet, it failed to demonstrate any genuine concern for the well-being and due process rights of two Australian citizens incarcerated abroad without trial and exposed to inhuman detention conditions.

The Government's rhetoric that Australia faced unprecedented and existential threat of terrorism, the frequency of legislative amendments as well as the complexity and breadth of the new anti-terrorism offences have also had a significant domestic impact. It arguably created a climate in which AFP and ASIO officers were emboldened to exceed their mandate and, in the ul-Haque case, were found to have behaved in a manner which was improper and oppressive rendering the records of interview inadmissible as evidence in a criminal trial. Similarly, the government-generated atmosphere of fear is likely to have contributed to a perception among law enforcement authorities that "terrorism" suspects needed to be treated differently from "normal" criminal suspects. This led to extraordinarily harsh treatment of prisoners on remand, which, in the Benbrika trials compromised the defendant's fair trial.

Many concerns about the scope and impact of Australia's counter-terrorism law and policy were further confirmed by the Haneef affair in which an (innocent) Indian doctor from the Gold coast

<http://www.abc.net.au/news/stories/2009/09/03/2676126.htm>.

was detained for 12 days without charge. When a magistrate took the brave and unusual step of ordering Haneef's release on bail, the Howard government intervened by withdrawing his immigration visa with a view to converting investigative detention into pre-deportation detention. This demonstrated a worrisome tendency on the part of the Howard government to intervene in the regular processes of criminal justice once when these produced a seemingly unfavourable political outcome. Mark Rix went so fas as to argue that both the ul-Haque and Haneef cases illustrated "the racial, ethnic and religious stereotyping, explicit or implicit, which helped to define the Howard government's approach to the war of terror."[969] He noted that the fear of persecution in Australia's Muslim communities engendered by the anti-terrorism legislation had been exacerbated by the manner in which the Government, the AFP and ASIO had conducted the Haneef and ul-Haque affairs.[970]

Whether one shares this assessment or not, it is beyond question that the implications of Australia's domestic counter-terrorism law and policy were not limited to the mishandling of a small number of cases. On the contrary, there is considerable evidence to suggest that the anti-terrorism laws have had a detrimental impact on Arab and Muslim Australians. This is particularly problematic as social cohesion is integral to preventing radicalisation and stopping terrorism in its tracks.

Finally, it is unclear whether Australia's counter-terrorism law and policy is actually effective. There have not been any terrorist attacks on Australian soil under the period of the legislation. However, this might equally have to do with the fact that Australia is not facing any significant threat. While this finding is somewhat speculative, of course, there is evidence to suggest that Australia's intelligence and law enforcement agencies have not had to rely on the new anti-terrorism provisions. Indeed, it appears that the enhanced arsenal of police and intelligence powers has not lead to the arrest of any terrorist suspects although some have faced prosecution for terrorism-related offences. It would seem that this either reflects the adequacy of the pre-existing criminal laws or the ineffectiveness of new legal anti-terrorism framework. This framework, however, already has negative consequences for the development of the law in other, non-terrorist contexts. Recent examples from South Australia and New South Wales demonstrate a worrisome trend that extraordinary legislative measures are normalised and adopted to address other areas considered to be risks to public safety.

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[969] Mark Rix, "With reckless abandon: Hancef and Ul-Haque in Australia's 'War on Terror'," Sydney Business School – Papers (2008) 11; <http://ro.uow.edu.au/cgi/viewcontent.cgi?article=1011&context=gsbpapers>.
[970] Ibid.

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CONCLUSIONS

This thesis has sought to examine the nature and scope of the contemporary threat of terrorism to Australia with a view to establishing whether the Australian government's domestic response has been proportional. To this end, it has explored how the Australian federal government portrayed and explained this threat to the Australian public. It has then re-examined the threat terrorism poses to Australia and its interests. This threat analysis was necessary in order to establish whether the Australian government's domestic response has been proportional. As the main focus of the domestic campaign has been on introducing and strengthening federal anti-terrorism laws, the thesis has questioned whether the government had demonstrated that its anti-terrorism legislation was suitable, necessary and appropriate to counter the threat of terrorism. It has then examined the impact of the Australian government's rhetoric and measures on domestic counter-terrorism practice. A final objective of the thesis was to explore whether Australia's domestic counter-terrorism law and policy has been effective. The research and analysis have produced the following main findings:

Finding 1: The principle of proportionality provides an appropriate and suitable framework for the analysis of Australia's counter-terrorism law and policy

In spite of claims that 9/11 had changed the world "forever" this thesis has argued that key principles identified for a liberal democratic response to traditional forms of terrorism applicable continue to apply to a response to contemporary international terrorism. In particular, the protection of human rights and civil liberties as well as the maintenance of democracy and the rule of law continue to form key imperatives for a counter-terrorism strategy in the post-9/11 era. While scholars and policy-makers appear to have accepted that these basic tenets continue to apply, some have argued that there needs to be a trade-off between civil liberties and human rights on the one hand, and "security" on the other. In this context, policy practitioners and academics commentator commonly allege that a "balance" must be struck between "liberty" and "security". However, this thesis has argued that the balancing paradigm is at best misleading and at worst structurally wrong. The validity of the balancing argument can be challenged on philosophical, rights-based, strategic and practical grounds.

As a consequence, the thesis has proposed an alternative analytical framework for the analysis of counter-terrorism law and policy. It has argued that rather than employing a balancing approach, policy-makers needed to apply a strict proportionality test. This test requires public policy to be carefully designed to meet the objectives in question and not be arbitrary, unfair or based on irrational considerations. In addition, public policy that takes into account the principle of proportionality needs to impair human rights, civil liberties and the rule of law as little as possible and also provide for adequate mechanisms of review. Although this proportionality test has yet to receive formal or constitutional recognition in Australia, it is applicable to Australian public policy as a general principle of limited government and good governance as well as through binding obligations under international human rights law. In the context of Australian counter-terrorism law and policy, the applicability of the concept of proportionality has been recognised by independent and Parliamentary committees. Its practical application means that the Australian government was ought to have demonstrated that its domestic anti-terrorism measures were necessary to counter the threat posed to the Australian community by terrorism, and that these measures constituted a proportionate response to that threat.

Finding 2: The Howard government's public assessment of the threat of terrorism was flawed, misleading, and subject to a range of considerable misunderstandings and exaggerations

The thesis has found that on the basis of deductive reasoning, the Howard government did not demonstrate adequately that Australia was a target for terrorist attacks, nor did it sufficiently address or frame the nature and quality of the terrorism threat to Australia. The analysis of a range of primary sources including prime statements by government representatives and policy papers against the backdrop of the literature on international terrorism has revealed that the government's public assessment of the threat of terrorism was distinctive for a range of flaws and considerable exaggerations. The government offered a narrative that drew heavily on the "war on terrorism" rhetoric of the administration of US President George W. Bush, both as far as content and specific metaphors were concerned. In particular, it adopted the view that Australia was a target for its "values" and for "what it is rather than for what it has done". However, both claims were problematic and displayed an exaggerated understanding of Australia's importance on the international stage, both as a "Western" nation and in its own right.

A further argument repeatedly made by the Howard government was the assertion that Australia was a target for terrorist attacks because it was implicitly and explicitly referred to in a number of public statements of terrorist organisations. The government portrayed these statements as

compelling evidence that Australia was subjected to a serious threat. At the same time it failed to acknowledge the possibility that the statements were issued for political and/or tactical reasons and in order to provoke public discomfort. Further concerns about the government's assessment of the terrorist threat stemmed from the fact that government failed to make clear that there is a fundamental difference between the terrorism threat to Australian interests abroad and the threat to Australia *mainland.* Several of its statements gave the misleading impression that terrorist attacks abroad were to be taken as evidence of a heightened threat at home.

Finally, the Howard government advanced the questionable argument that Australia's geographical isolation no longer provided any protection from the threat of terrorism. Yet again, the government did not provide any satisfactory explanation to justify its claim. In particular it failed to recognise that Australia's remote location and its maritime borders continue to provide significant protection which is not available to other countries.

Finding 3: Terrorism poses a negligible *objective* threat to Australia

In light of the shortcomings of the Howard government's public assessment of the threat of terrorism, it was necessary to submit the threat of terrorism to Australia to a critical re-examination. To this end, the thesis has questioned the suitability of the concept of security as a tool for meaningful analysis of counter-terrorism law and policy. It has argued that any analysis of counter-terrorism law and policy needed to begin by identifying the source and target of the threat in question. While the threat of international terrorism is considerably complex, it is possible to classify the threat into three categories. These consist of the threat posed by the core leadership of Al Qaeda, the threat from regional militant organisations, and the threat posed by so-called home-grown terrorists.

Having identified the sources of the threat, the thesis has examined how international terrorism threatens stable Western democracies. It has found that terrorism unquestionably threatens the safety and physical integrity of individuals as well as property. At the same time, conventional forms of violence such as traditional and civil wars have almost always been more deadly. The terrorist threat to safety and physical integrity further diminishes when terrorism-related fatalities are compared to fatalities totally unrelated to political or armed violence. The thesis has also found that the assertion that terrorism is threatening the very basis of power and legitimacy of liberal democratic states is rather unconvincing. In this context it has argued that in spite of the possibility that terrorists may, at some stage in the future, gain access to nuclear devices, the current alarm is

exaggerated and based on theoretical worst-case scenarios rather than factual evidence. Finally, the thesis has questioned whether terrorism poses a threat to the economy of Western liberal democratic states. The examples of recent terrorist attacks suggest that terrorism does not have a significant *direct* effect on Western economies. In light of these findings, the thesis has argued that terrorism poses a low *objective* threat to Western democracies. This conclusion, however, should not be seen as an attempt to trivialise the significance of international terrorism and its political ramifications.

As far as the terrorist threat to Australia is concerned, the thesis has argued that it is imperative to distinguish clearly between threats to Australian interests abroad and the threats to Australia's *mainland* as these threats may have entirely different sources. Given that the stated purpose of Australia's domestic counter-terrorism law and policy was to counter the domestic terrorism threat in Australia, particular focus was given to the likelihood of a terrorism attack occurring on Australian soil. The thesis has found this likelihood to be rather low. An attack on Australia's homeland appears to be of very little value to both Al Qaeda and the regionally-based Jemaah Islamiyah. The threat of terrorism in Australia thus stems predominantly from so-called home-grown jihadists. Nonetheless, not a single attack has been perpetrated to this day and even Australia's domestic intelligence agency ASIO has acknowledged that only a very small minority of the community hold or has held "extremist" views with even fewer being prepared to resort to actual violence. It remains questionable whether the small number of potentially militant "extremists" that are ready to employ violence can be considered an unprecedented threat to Australia's national security. In particular it is difficult to see how the threat could degrade institutions and principles that are fundamental to Australia's social and economic stability.

Finding 4: The *subjective* perception of the threat of terrorism among the Australian public provided an imperative for the Australian government to develop an effective counter-terrorism law and policy

While international terrorism does not pose an existential or even major objective threat to the stability of Western liberal democracies or its key national interests, it has significant implications as far as the subjective perception of the threat is concerned. Indeed, the research for this thesis has revealed that the threat of terrorism is perceived differently from other threats, even if the objective likelihood of dying in a terrorism attack is much lower than being killed in an accident or otherwise. The thesis has found that these dynamics are also at play in Australia. In spite of the small chances of falling victim to a terrorism attack, opinion polls regularly reveal that terrorism ranks among the key concerns of the Australian public. The thesis has argued that the public perception of the threat

needs to be taken into account in the formulation of national counter-terrorism law and policy. However, given that the terrorism threat is objectively low, policy measures addressing the threat must be carefully designed to meet the requirements of proportionality and (potential) effectiveness.

Finding 5: Australia's anti-terrorism laws raise serious concerns in relation to their proportionality

While some countries already had counter-terrorism legislation in place on 9/11 (reflecting their own particular historical experience of dealing with political violence) others only began to legislate on the subject of terrorism after this date. Australia was one of the countries which had no specific national laws on the subject of terrorism prior to the events 9/11. The federal government has since enacted a total of 42 different pieces of legislation whose specific aim was to combat and prevent terrorism. Importantly, the legislative amendments were conceived and implemented in a climate of fear and public anxiety over the prospect of imminent terrorist attacks and the felt necessity for the government to take decisive action. This environment was unconducive to reasoned, reflective democratic debate. As a result, it is submitted in this thesis that many aspects of the counter-terrorist legislative framework have been enacted without adequate consideration for human rights issues and indeed in a manner which undermines the principles of deliberative parliamentary democracy. As such they raise serious concerns in relation to proportionality.

The thesis has focused on the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) and the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) which represented the core of the Government's first package of anti-terrorism laws. Both pieces of legislation introduced measures unprecedented in Australian history, that many of the new provisions were drafted too broadly and lacked legal certainty, and that the laws continue to lack necessary safeguards. In particular, arrangements that enable ASIO to detain and question non-suspects for a maximum time of seven days were found to be highly problematic. The fact that Australia is the only Western democracy that has legislated for such extraordinary powers for its domestic intelligence agency raises serious proportionality concerns.

Similarly, the thesis has argued that a number of legislative amendments enacted from mid-2003 through late 2005 failed to meet the requirements of proportionality. These changes were mostly contained in the Anti-Terrorism Acts of 2004 and 2005. They included the reversal of the presumption in favour of bail for suspects charged with terrorism-related offences and the introduction of non-parol periods for persons convicted of terrorism-related charges. Furthermore,

the *Anti-Terrorism Act [No.2] 2005* (Cth) introduced a highly controversial control order and preventative detention regimes which continue to raise serious concerns in relation to their proportionality. In particular, the Government failed to establish the need for such unprecedented measures. It also did not demonstrate that the control order and preventative detention regimes constituted the least restrictive means for achieving the objective of preventing terrorism.

Finding 6: The Howard government's approach to counter-terrorism law and policy was distinctive for its overt political character

Another key finding of this thesis is that the Howard government's approach to counter-terrorism law and policy was distinctive for its overt political character. This is particularly evident in the legislative amendments enacted by the Government in late 2003 and throughout 2004. The laws adopted in this period were mainly triggered by three incidents, the Willie Brigitte Affair, the Jack Roche case and the Bilal Khazal bail hearing. These incidents exposed failures in intelligence sharing and communication and had the potential to embarrass the Government in the lead up to the 2004 federal election. Rather than demonstrating a coherent approach to legislative reform, these cases were distinctive elements of the Howard government's obvious political approach in shifting responsibility for, and in seeking remedy of a national security administrative and policy failure through the expansion of the legislative counter-terrorism framework.

Similarly, the drama that accompanied the adoption of the *Anti-Terrorism Acts [No. 1 and 2] 2005* (Cth) – which broadened the scope of criminal liability significantly and established highly controversial control order and preventative detention regimes – demonstrated that the Government was prepared to play politics with terrorism in order to pursue its partisan legislative agenda and to divert public attention from unpopular proposals such as changes to Australia's industrial relations. The thesis has argued that the Acts' expedited passage through Parliament was largely typical of the legislative process which has underpinned Australian counter-terrorism law and policy under the Howard government. Terrorism-related matters were legislated in great haste and legislative proposals were presented with adequate opportunity for scrutiny, public input and useful debate. This process, however, led to inferior ant-terrorism legislation that failed to meet the requirements of necessity and proportionality.

Finding 7: The government's terrorism-rhetoric, the frequency of legislative amendments and the complexity and breadth of the new anti-terrorism legislation have had a detrimental impact on domestic counter-terrorism practice as well as other negative consequences

In addition to concerns about the proportionality of Australia's domestic response, the thesis has demonstrated that the Howard government's terrorism-rhetoric, the frequency of legislative amendments and the complexity and breadth of the new anti-terrorism legislation have had a negative impact on domestic counter-terrorism practice. The cases of the two Australian Guantanamo Bay detainees, Mamdouh Habib and David Hicks, cases illustrated that the Australian government was prepared to abandon two of its citizens and sacrifice respect for fundamental legal and moral principles in order to achieve (perceived) political gain. The thesis has also found that the impact of the Government's terrorism rhetoric as well as of its policy and law more generally extended to domestic counter-terrorism practice and to the detention conditions for suspects on remand. The case of Izhar ul-Haque suggested that the Government's exaggerated portrayal of the terrorism threat emboldened ASIO and AFP officers to exceed their authority and mandate by flagrantly violating fundamental rights of terrorism suspects. Moreover, the ul-Haque case and the Benbrika trials illustrated that persons charged with terrorism-related offences had to endure extraordinarily harsh prison conditions while being detained on remand. In the Benbrika trials, this led to the court ordering a stay of the proceedings because the detention conditions in which the accused were being held in were considered to jeopardise a fair trial. The thesis has also examined the case of the Gold Coast-based Indian doctor Mohammed Haneef which concerned the improper detention of an innocent person on terrorism-related charges. This mishandled case highlighted many of the concerns about Australia's anti-terrorism laws which, until then, had existed only in the abstract.

Apart from the detrimental impact on domestic counter-terrorism practice, Australia's counter-terrorism law and policy has had other negative consequences. The thesis has found considerable evidence to suggest that harmful effects are being felt Australian Arabs and Muslims. Although the anti-terrorism laws are expressed in ethnically and religious neutral terms, there is a perception amongst Australia's Muslim communities that they are targeted by these laws and by those who apply them. This has led to the alienation of some members of those communities, increased fear and insecurity and created a growing distrust of authority. The thesis has argued that this development has the potential to undermine the very purpose of the legislation and to make it more difficult to effectively manage the threat of terrorism in the long-term.

A further negative effect of Australia's counter-terrorism law and policy has been that extraordinary legislative measures are normalised and adopted to address other areas considered to be risks to public safety. Recent non-terrorism laws in South Australia and New South Wales have adopted provisions and arrangements similar to those of federal legislation but aimed at criminal organisations and "bikie-gang" violence. Equally worrisome, the legislative process in those states mirrored the way in which many federal anti-terrorism laws were enacted since 2002 as the laws were passed in great haste and without proper parliamentary scrutiny.

Finding 8: It is unclear whether Australia's domestic counter-terrorism law and policy has been effective

Finally, the thesis has concluded that it is unclear whether Australia's domestic counter-terrorism law and policy has been effective. There has not been any terrorist incident in Australia in the post 9/11 area. However, this might equally be the consequence of Australia not being subject to any significant terrorist threat. The thesis has found that measuring the effectiveness of Australia counter-terrorism law and policy is generally difficult as few details about its operation are publicly available. Moreover, some anti-terrorism laws contain provisions which hinder assessing questions of effectiveness. Publicly available information suggests, however, that the new powers of Australia's intelligence and law enforcement agencies have rarely been used in practice. The thesis has argued that this reflects either the adequacy of the pre-existing laws or the ineffectiveness of legislation that provides for extraordinary powers. Similarly, in spite of the prolific legislative activity in the field of counter-terrorism in the past seven years, few criminal prosecutions and even fewer convictions have resulted from the legislative changes which have been introduced.

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